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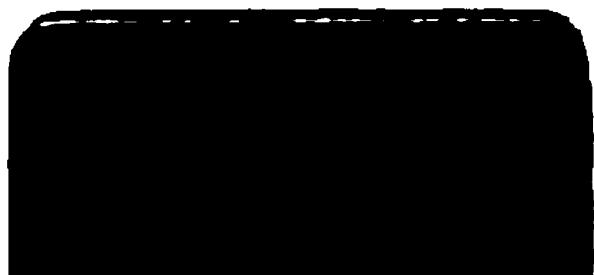
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The government of the Union, like that of each State, must be able to address itself immediately to the hopes and fears of individuals; and to attract to its support those passions which have the strongest influence upon the human heart. It must, in short, possess all the means and have a right to resort to all the methods of executing the powers with which it is entrusted that are possessed and exercised by the governments of the particular States.

—*Alexander Hamilton, The Federalist, No. XVI.*  
*December 4, 1787.*



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**THE**  
**CONSTITUTIONAL HISTORY**  
**OF THE**  
**UNITED STATES**

---

**BY**  
**FRANCIS NEWTON THORPE**

---

**IN THREE VOLUMES**  
**1765-1895**

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**VOLUME TWO**  
**1788-1861**

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**CHICAGO**  
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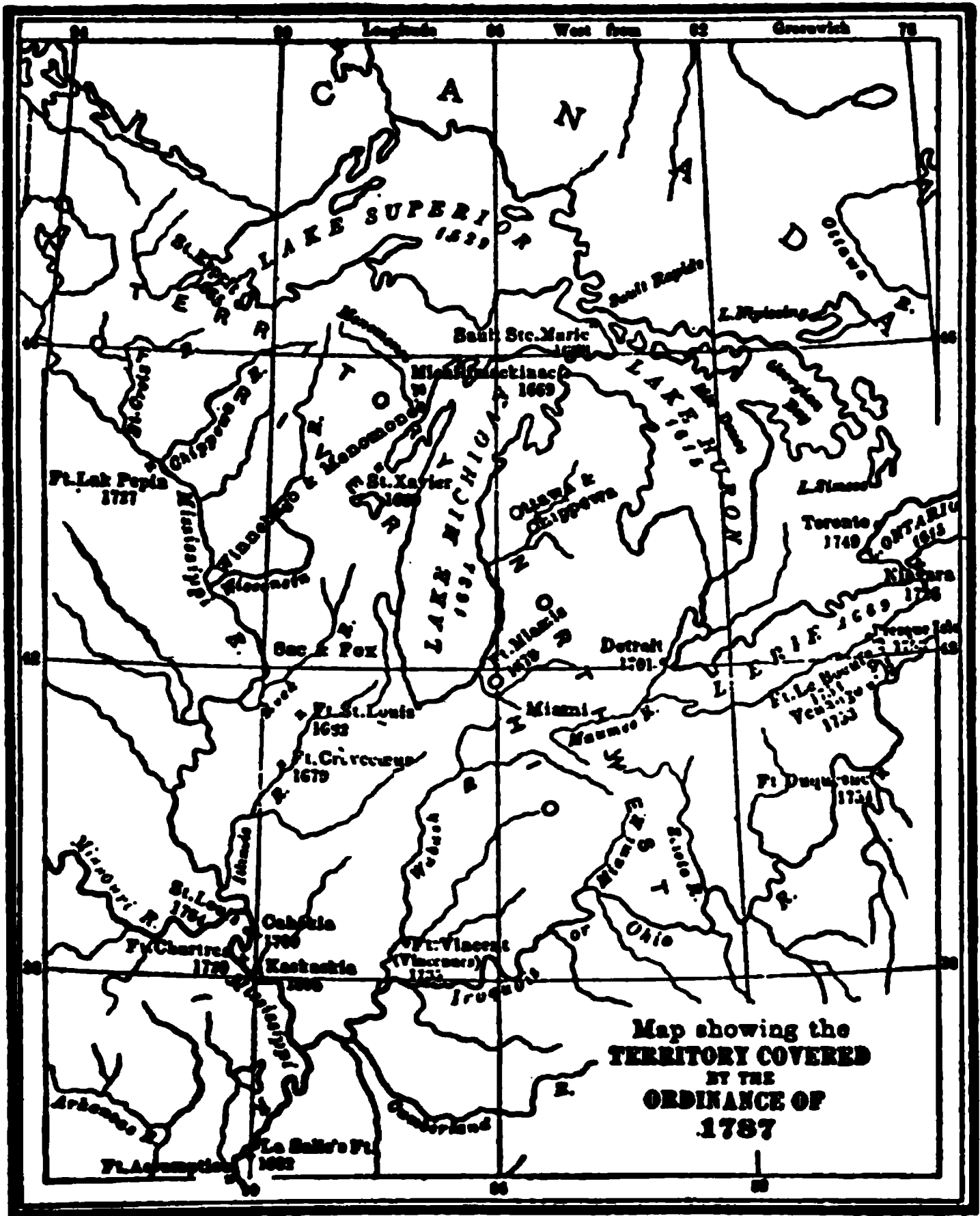
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## **BOOK III.**

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### **THE CONSTITUTION BEFORE THE PEOPLE.**



# THE CONSTITUTIONAL HISTORY OF THE UNITED STATES.

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## CHAPTER I.

### THE CONSTITUTION BEFORE CONGRESS AND THE COUNTRY: RATIFICATION BY DELAWARE, PENNSYLVANIA, NEW JERSEY, GEORGIA AND CONNECTICUT.

While the Convention had been working out the draft of the Constitution, Congress, in session at New York, had passed several acts of which the most important was "the ordinance for the government of the United States northwest of the river Ohio." The act of 1784, providing for a territorial government of the Northwest, was never operative. Its amendment occupied Congress at short periods during the two following years, but not until the ninth of July, 1787, was the plan handed over to a new committee for completion.<sup>1</sup> The energy and activity of the recently formed Ohio Company seem to have been the principal cause of reviving the subject. Of the members of the committee none was more sagacious and active than Nathan Dane of Massachusetts. It is impossible to identify the special contribution of its members to the work in hand. It is evident, however, upon comparison of the bill reported with the laws and constitutions already in

<sup>1</sup> The committee consisted of Nathan Dane, Melancton Smith, Edward Carrington, Richard H. Lee and John Kean. See J. A. Barrett's *Evolution of the Ordinance of 1787*, University of Nebraska, Seminary Papers, April, 1891, 51. This exhaustive monograph cites authorities.

force, that these were the precedents upon which the greater part of it rested, and particularly of those clauses in the ordinance in the nature of a Bill of Rights.<sup>1</sup>

Among the most active friends of the bill was Manassah Cutler, a clergyman, who had exerted himself in forwarding the plans of the Ohio Company, had visited New England to help organize it and to stimulate emigration, and had come to New York to win it friends among the members of Congress. It has been claimed that to Doctor Cutler is due the anti-slavery clause finally inserted in the ordinance. On the eleventh of July, the committee submitted its report, but the draft did not contain the provision against slavery. It will be remembered that in the first project for organizing a State in the Ohio country, in 1783, its New England founders had inserted a clause forbidding slavery.<sup>2</sup> There is no doubt that anti-slavery opinions were held generally by the men and women of New England who intended to make the Ohio country their home, as soon as Congress would give it a civil organization. If Doctor Cutler had advocated the prohibition of slavery, it would seem that an anti-slavery clause would have been inserted in the committee's draft. His support of slavery, a few years later, when a member of Congress from Massachusetts, hints that he may not have been opposed to it in 1787.<sup>3</sup>

The evidence of the authorship of the prohibitory clause confirms the claim of Dane that he drew it, almost in the language in which it passed, though with little hope, at

<sup>1</sup> The clause from the State constitutions which were precedents are reprinted by Barrett, 57-60-65. They are from the constitutions of Massachusetts, Virginia, Pennsylvania, Maryland, North Carolina and Georgia, and especially the laws of Massachusetts. Act of February 6, 1784.

<sup>2</sup> Barrett, 6-8.

<sup>3</sup> Barrett, 76.

first, that it would be approved.<sup>1</sup> He moved the adoption of the article and it was agreed to without opposition. The proviso for the rendition of fugitive slaves was added at the suggestion of Rufus King, who had first suggested it in 1785. On the thirteenth of July, when the ordinance passed Congress, in New York, the Federal Convention was engaged, in Philadelphia in determining the basis of representation, and whether or not it should include slaves.<sup>2</sup> It was probably not without some mutual understanding that Congress and the Convention were turning their thoughts to the same great question about the same time, for several members of the Convention were members of Congress and were informed of its proceedings. A motive for excluding slavery from the Northwest Territory was not hard to find. The Ohio river nearly equally divided the western country. The land cessions from the States gave Congress at least collateral security for its credit and removed much anxiety respecting the ultimate payment of the public debt. The climate north of the Ohio was known to be unfavorable to the extensive production of southern staples, indigo and tobacco; it was believed that these could be profitably produced only by slave labor; and therefore if this was forbidden in the new region, the southern States would have, practically, a monopoly of these two industries. Then, too, migration into the Northwest would strengthen the national defenses on the frontier and tend to secure the control of the navigation of the Mississippi for the United States. Whatever hostility to anti-slavery provisions might have been entertained by southern members of Congress at this time, it was practically quieted by the conviction of the absolute gains to the country which an early and vigorous settle-

<sup>1</sup> Dane to Rufus King, July 16, 1787; Barrett, 76.

<sup>2</sup> Elliot, V, 308.



ment of the Northwest would give. Moreover, as the clause was coupled with a proviso for the return of fugitive slaves, it possessed a compensatory element of no small importance. As the fugitive slave clause had been inserted in the plan in 1785, the matter when finally it came up in Congress had all the weight practically of an established precedent.<sup>1</sup>

Had the Constitution remained to this day exactly as it went forth to Congress and the States in 1787, the northwest ordinance would have passed into oblivion long ago. Even its fundamental importance, as the basis of later territorial organization, could not have given it the important place in our constitutional history which it attained. Because it was the first national act limiting slavery, and its anti-slavery clause was adopted word for word in the organic acts of all territories organized from Pennsylvania to the Pacific, and, when these were admitted as States, was copied into their constitutions; and because nearly eighty years after its adoption, its anti-slavery clause became the Thirteenth Amendment to the Constitution of the United States, its importance is not secondary to any slavery provision contemporaneous with it in the Constitution.

Its importance is in no wise diminished by the interpretation which Madison put upon it in the *Federalist*, that in proceeding to form new States, to erect temporary governments, to appoint their officers and to prescribe the conditions on which these new States should be admitted into the confederacy, Congress had proceeded "without the least color of constitutional authority."<sup>2</sup> Nor is its importance diminished by the fact that Chief-Justice Taney

<sup>1</sup> Barrett, 79-80.

<sup>2</sup> No. XXXVIII. It appeared in the *New York Packet*, January 15, 1788

in his opinion in the Dred Scott case, seventy years later, sustained Madison's views.<sup>1</sup> The great ordinance originated at the time of the Constitution and almost with it, and though, later it was declared unconstitutional, its anti-slavery provision had already received public approval for three generations and had come to be ranked among the accepted precedents in American government.

When the Constitution, on the twentieth of September,<sup>2</sup> was presented to Congress, opposition there was already well organized. At its head was Richard Henry Lee of Virginia, whose chief objection was the evident purpose of the new plan to organize a national instead of a federal government. He left nothing within his power unturned to defeat it. In Congress he was an obstructionist, pleading for a Bill of Rights; out of Congress, he was an agitator and pamphleteer, attacking the plan as a violation of the principles of republican government. His conduct, whether in refusing to accept an appointment to the Federal Convention or in his persistent and almost passionate hostility to the Constitution was no compliment to his sagacity as a statesman. Lee was supported in Congress by several members, who carried home the spirit of their opposition, and in their own States became its head and front. The consent which Congress had given to the calling of the Federal Convention was a sufficient answer to any objections on its part, now, to submit the plan to the States; and happily the opposition was in the minority. The friends of the plan in Congress, chief of whom was Madison, were impatient for Congress to express its formal approval and refer the Constitution to the legislatures.

<sup>1</sup> 19 Howard, 447. For an account of the case of Dred Scott see pp. 536-551; and for an account of the adoption of the thirteenth amendment, see Vol. III.

<sup>2</sup> 1787.

They wished a unanimous submission, just as the friends of the Constitution had wished unanimous approval by the States in convention.

Melanchton Smith of New York, and his colleagues, were inflexible that, in submitting the plan, Congress should use no words of approval; and in this spirit,—the Anti-Federalists, consenting to unanimity, and the Federalists, that the Constitution should go forth without words of approval,—on the twenty-eighth of the month, Congress unanimously referred the Constitution to the legislatures of the several States, to be by them submitted to conventions, chosen expressly for the purpose, as the Philadelphia meeting had advised.<sup>1</sup> This Convention, composed of the first characters in the country; assembling with closed doors and at a time when the fortunes of the Confederation were at their lowest ebb, had awakened highest expectation among all ranks of people. Washington and Franklin possessed a world-wide reputation; and other members, no less zealous for political reforms, were, without exception, the leading men of their States. The long labor in which they engaged had of itself awakened wide interest in the result. What thought the public gave to the Convention seems to have been favorable and confiding; it was convinced that affairs could not be worse managed under any government which the Convention was likely to propose than they had been under the confederation, an efficient government on republican principles must be established.<sup>2</sup>

But there is no evidence that the people expected a plan

<sup>1</sup> Journals of Congress, September 28, 1787. For the resolution of Congress, submitting the Constitution, and the circular letter of Secretary, transmitting it to the governors, see Documentary History, I, 22-23.

<sup>2</sup> Carrington to Jefferson, June 9, 1787, and to Madison, June 13.

which would involve the complete surrender of State sovereignty, nor is there evidence of serious apprehension that republican principles were in danger. From the best evidence we have, it seems that at the time when the Constitution went to the States, public opinion in Virginia was uncertain. In New England and the middle States, where the greater number of newspapers were published, controversies over the new plan immediately sprang up and continued to the end. The opposition centered its attack upon the omission of a Bill of Rights. In New England generally, the plan was favorably received, though Rhode Island was an exception. New York was divided; New Jersey was reported favorable; in Pennsylvania there was a strong opposition. Maryland was said to be decidedly in favor of the Constitution; Georgia too, was supposed to be friendly; the news was less encouraging from the Carolinas,<sup>1</sup> though it was not thought that the Constitution would be seriously opposed in South Carolina. Foreign observers could not understand why there should be any opposition; to them the alternative in America was consolidation or anarchy.<sup>2</sup> Undoubtedly the mass of the people who gave any attention to the matter, associated the name of Washington with the new plan, and already selected him as the head of the new government.<sup>3</sup> That his life was spared at this time made the more perfect Union possible.

But the public was not left undisturbed by the opposition. Richard Henry Lee was indefatigable in hostile speaking and writing, and on his way home from Congress,

<sup>1</sup> Madison to Randolph, October 21, 1787; Carrington to Jefferson, October 23, 1787; Gouverneur Morris to Washington, October 30, 1787; Elliot, I, 505.

<sup>2</sup> Lord Dorchester and Lord Sydney, November 8, 1787.

<sup>3</sup> A. Donald to Jefferson, November 12, 1787.

not only harangued the populace, as at Wilmington, Delaware,<sup>1</sup> cautioning against hasty adoption, but also distributed inflammatory letters<sup>2</sup> which were the most popular and probably most influential of all attacks against the plan.<sup>3</sup>

Already the names Federalists and Anti-Federalists were used to distinguish the friends and the enemies of the plan. The policy of the Anti-Federalists was to persuade the people that the Constitution violated the principles of republican government, and, especially, that it antagonized and endangered the State constitutions. The Anti-Federalists did not tell the people how faithfully the Philadelphia Convention had labored to avoid antagonism with these State instruments. As we have followed the making of the plan we have seen how closely it conformed to precedents in the State constitutions, but these instruments were not as familiar to the people as one might perhaps imagine, for they were no more freely circulated than the decisions of the courts. It was the policy of the Federalists to persuade the people that the Constitution not only was constructed on republican principles, but that it conformed closely to the State instruments and could not fail to remedy the defects of the Confederation, secure the common defense and promote the general welfare.<sup>4</sup> Even at this early period the population of the country was divided into two classes, the urban and the rural. The first inhabited the coast region and

<sup>1</sup> Samuel Powell to Washington, November 13, 1787.

<sup>2</sup> Signed "Federal Farmer."

<sup>3</sup> His letters from a "Federal Farmer" to the "Republican" are reprinted in Paul Leicester Ford's collection of Pamphlets on the Constitution of the United States, published during its discussion by the people; Brooklyn, New York, 1888.

<sup>4</sup> This is the general argument of the Federalist, see Nos. I-XXIII.

dwelt along the important navigable rivers. The second was more or less isolated, either within the recesses of the interior of the States, or inhabiting western and inaccessible parts of the country, and was thus removed, as it were by nature, from the active affairs of the world. The federal and anti-federal areas were distinct political sections.<sup>1</sup>

In New Hampshire, the federal area lay along the coast and in the Connecticut valley; the inhabitants of which region were fully alive to an adequate protection of commerce. The Connecticut river settlement, indeed, may be said to have faced the south and to have been economically a part of the central Massachusetts and Connecticut belt. The sentiments of its people were overwhelmingly in favor of the new plan. The anti-federal element in the State consisted chiefly of the Scotch-Irish communities west of the Merrimac river, a region shut off from the sea.<sup>2</sup> The seaboard district in Massachusetts was overwhelmingly federal, but the middle and western portions of the State were equally anti-federal. Here were to be found Daniel Shays's friends and followers, who composed four-fifths of the opposition, all of whom favored the repudiation, or seeking of debts, public and private, and an unlimited use of paper money.<sup>3</sup> In Connecticut, a State, whose people depended largely upon commerce, the sentiment in favor of the new plan was almost unanimous; and the little opposition was political rather than economic. The State

<sup>1</sup> See the *Geographical Distribution of the Vote of the Thirteen States on the Federal Constitution, 1787-1788*, by Orin Grant Libby, M. L. Fellow in History; Bulletin of the University of Wisconsin, June, 1904. This monograph presents the results of diligent and intelligent examination of the condition of the country at the time.

<sup>2</sup> Libby, pp. 7-12.

<sup>3</sup> Libby, 12-14.

was quite at the mercy of New York, and contributed about one-third<sup>1</sup> of the tax,—amounting in the aggregate to upwards of three hundred and fifty thousand dollars, which that State collected in tariff duties at its great port. The new plan would abolish the cause of this grievance.<sup>2</sup>

Rhode Island, which at this time was in the hands of fiat money men, was quite lost to reason, and practically unanimous in its opposition.<sup>3</sup> New York State was a wilderness, except in the Hudson Valley. The city of New York was federal, but the remainder of the State, with slight exceptions, anti-federal. As the traveler, starting from Federal Hall, went northward, he speedily found himself in an anti-federal community, which reached quite to Albany. New York city gave the State an opportunity to monopolize the commerce of Connecticut and New Jersey, and it had long profited by the monopoly. But its gains through imposts on its neighbors was as great a grievance to New Jersey as to Connecticut. Yet, almost without exception, the mercantile class in New York was friendly to the plan, and was only surpassed in zeal by the young lawyers, who by reason of youth, of obscurity and the lack of family connections, had no prospect of a career in State politics. The people of New Jersey, who were in much the same position as those of Connecticut, were quite unanimously in favor of the Constitution. When the Articles of Confederation had been submitted to its legislature, this body had demanded that the regulation of commerce should be vested in the general government,<sup>4</sup> and to this opinion it had always held. The new plan completely

<sup>1</sup> Ellsworth in the Connecticut Convention; Elliot, II, 189.

<sup>2</sup> Libby, 16.

<sup>3</sup> Madison to Washington, October 14, 1787; and to Jefferson, October 24, 1787; Works, I, 342-355.

<sup>4</sup> See Vol. I, p. 235.

met this demand and assured the State relief from the imposts levied by New York.

Pennsylvania was a divided State. In Philadelphia, the commercial class welcomed the new plan, but the traveler could not go thirty miles westward from the Delaware before encountering many evidences of the anti-federal opinions, held almost to a man by the inhabitants of the western counties. About Pittsburg centered the influence of the Scotch-Irish emigrants. They were satisfied with the constitution of the State, which was distinguished from the prevailing American type in having only one House. But, as in New York, it was the office-holding class in the State, who declaimed most loudly against the new Constitution.<sup>1</sup> In the eastern and older part of Pennsylvania, where the English and German element predominated, where most of the population was found, and the wealth and influence of the State were centered, opinion was strongly federal.

Delaware, in its early history a part of Pennsylvania, was in close commercial association with Philadelphia. Its principal city, Wilmington, had prospered even under the restrictions that had so long injured the country. The people of the State were homogeneous, and since all danger to its equality in the Senate had vanished, it had everything to gain and nothing to lose by approving the new plan. Federalism in Delaware, therefore, rested on the double foundation of politics and economy.

Maryland was a commercial State, and therefore public opinion inclined to be federal. The mercantile interests, centering at Baltimore, and extending thence in all directions tended to unify opinion. Whatever the political leaders of the State may have thought as individuals, it

<sup>1</sup> Pennsylvania and the Federal Constitution, McMaster and Stone, 10.



was to their interest to conform to public sentiment. Luther Martin's somewhat noisy objections to the Constitution did not increase his popularity. The working class were confident that the new plan would lower the rates of interest, would stimulate industry, would equalize the burdens of life, and, above all, free the masses from the tax gatherer.<sup>1</sup>

The commercial interests of Virginia were confined chiefly to the tide water district, and here federal sentiment prevailed.<sup>2</sup> Here, too, were found the large towns, the lawyers in lucrative practice and in general the best informed people of the State. Westward, extending as far as the Blue Ridge mountains, lay a region possessed by small farmers, poorer in slaves than the tide water planters and far less prosperous. Their opinions were as pronouncedly anti-federal as those in the tide water region were federal. Passing over the mountains, where the Scotch-Irish and German emigrants had settled, sentiment again became federal. The economic condition of the country was not unlike that of Delaware. The Constitution promised the people advantages to be had from no other source.

But when the traveler had reached the people living in the Kanawha and Kentucky valleys, he found himself in an anti-federal stronghold. Here public sentiment grew out of those discords which had long been separating Kentucky from Virginia, clamoring for independence, and prone to interpret any form of national government as an intolerable burden. But anti-federalism here may be said to have rested on local prejudices. The suspicion that by the new plan the Mississippi would be under the control of Spain did not win it any friends. The Anti-Federalists

<sup>1</sup> Pennsylvania Gazette, April 2, 1788.

<sup>2</sup> Mr. Libby estimates it at 80 per cent.

of Virginia found an advocate in George Mason, who did not delay to publish his objections to the Constitution,<sup>1</sup> already familiar to the members of the Philadelphia Convention.

In no other southern State was anti-federalism so strong as in North Carolina; yet, opposition there took the form of apathy rather than agitation. Population was widely scattered, and it was difficult to obtain its aggregate opinion on any question. Yet, in the few larger towns a respectable federal feeling existed. Many of the merchants were from Virginia and Maryland, and they held the opinions of their class. As soon as the character of the new plan was made known to the people of the State, their apathy began to disappear and the wealthier portion developed federal opinions. Leaving the federal towns of Hillsboro and Wilmington, and passing westward, the traveler found himself in an almost untouched wilderness, with here and there a settlement, whose people were mostly anti-federal in sentiment. After he had crossed the mountains into the settlements on the Watauga and the Cumberland and had visited the people of Frankland, he soon detected a change, for the people of these new regions were aspiring to become an independent State, and saw in the Constitution an opportunity to realize their wishes.<sup>2</sup>

South Carolina, like Pennsylvania, consisted of rival sections of population. The people of Charleston and the sea-board towns were strongly federal, but the country districts, comprising the middle and western portions of

<sup>1</sup> The objections of the Honorable George Mason to the proposed Constitution, addressed to the citizens of Virginia; Ford's Pamphlet, 329-332; see the answer to them by James Iredell, Id., 333-370.

<sup>2</sup> See Caldwell's Constitutional History of Tennessee, Chapters I-III.

the State, were equally anti-federal. Here, as in other States, the Tories generally favored the Constitution, and for that reason, if for no other, their local enemies, the Whigs, opposed it.<sup>1</sup> The State illustrated a paradox in the political history of the times; that of a people who had stubbornly opposed the Revolution now no less vigorously favoring a national government based on republican principles. The geographical situation of Georgia made its people anxious for the new plan. Theirs was the most troublesome frontier; their slaves were escaping into the Floridas; war with Spain might break out at any time; hostilities with the Creeks and Choctaws were continuous, and therefore a strong national government came to them as a welcome relief and a promise of peace.

But public opinion of the new Constitution was based on some other grounds. The attitude of the people of the States to paper money, to the public credit and the obligations of contracts, public and private, as discussed in their support of local legislative measures, is undoubtedly a more trustworthy sign of the times. The evils of paper money were clearly recognized by the Federal Convention, and it made every effort to crush them. The federal and anti-federal districts in the States coincided quite accurately with the division of the people as friends or foes of fiat money.

In New Hampshire, in 1786, an emission of bills of credit, on land security, to the amount of fifty thousand pounds, had been made by the vote of fifty-three to twelve. Of the twelve who opposed, eleven came from federal towns, and twenty-seven who favored the emission from anti-federal.<sup>2</sup> In Massachusetts, of the towns that supported Daniel Shays and also paper money in 1786, when

<sup>1</sup> Libby, 34.

<sup>2</sup> Libby, 53.

later the acceptance of the Constitution was the issue, two were federal and twenty-two anti-federal, and of the towns opposing Shays and fiat money, twenty, in 1788, were federal and eight anti-federal.<sup>1</sup> These facts support the estimate which General Knox furnished to Washington that four-fifths of the anti-federal party in the State were, in one way or another, concerned in the Shays movement.<sup>2</sup>

The little opposition to the Constitution which existed in Connecticut was maintained almost solely by men holding fiat money views.<sup>3</sup> The paper money proclivities of the people of Rhode Island had elected a legislature which had refused to send delegates to the Philadelphia Convention, and these proclivities were no less intense now that its work was before the State for its approval. The strength of the paper money men in New York lay almost solely outside of the city. No vote against a paper money bill could be depended on from a member north of New York county.<sup>4</sup> The chamber of commerce, which reflected the opinion of the New York merchants, was inflexibly opposed to paper issue. Even in New Jersey, where federal views prevailed, the test of a fiat money bill drew the line between Federalists and Anti-Federalists. No friends of such a measure could be found among the people adjoining New York or Philadelphia and depending for their prosperity upon commerce. In New Jersey, it was without exception the debtor class that opposed the new plan.<sup>5</sup>

In Delaware, the opposition of the paper money men

<sup>1</sup> Libby, 57.

<sup>2</sup> Knox to Washington, February 10, 1788; *Massachusetts Convention, 1788* (Edition, Boston, 1856), 410.

<sup>3</sup> Libby, 58.

<sup>4</sup> Libby, 59.

<sup>5</sup> Libby, 61.

to the Constitution was restrained, in great measure, by their sense of the obvious advantage to the State of an early ratification; but the Anti-Federalists here were all paper money men. In Pennsylvania, the fiat money party was also anti-federal to a man. They firmly believed that there was not gold and silver enough to meet public obligations, and that a paper-money system lightened the burdens of land taxation, and compelled the rich to pay most of the taxes. In 1785, the vote in favor of a funding bill enrolled seventeen members in opposition, and, of these, thirteen were from counties which were federal in 1788.<sup>1</sup> That the new Constitution forbade States to issue bills of credit aroused the hostility of most of the inhabitants of Pennsylvania, living west of Lancaster.

The demand for paper money in Maryland had long been loud and vehement, but an issue had been prevented by the Senate. The Maryland Senate was chosen by an electoral college, and the method was praised by Madison in the Federal Convention as an agency checking and balancing the tumultuous legislation of the lower House. Doubtless had it not been for the conservatism of the Senate, the paper money faction in Maryland would have controlled the State. At the head of this faction was Luther Martin, who threatened secession if the Senate should not comply with the demands of the House.<sup>2</sup> But the weight of the commercial class in Maryland had been sufficient to hold the Senate to a conservative course. The anti-federal minority adhered solidly to the leadership of Martin.<sup>3</sup>

From the evidence which reaches us it appears that in

<sup>1</sup> *Pennsylvania Gazette*, March 23, 1785; Libby, 63.

<sup>2</sup> See Bancroft's Pamphlet on the Legal Tender Decisions, Entitled, "A Plea for the Constitution of the United States of America, 1886."

<sup>3</sup> Libby, 65.

Virginia, men holding federal opinions were uniformly opposed to paper money issues, and that the most vehement opponents to the Constitution were men who, like Patrick Henry, were suspected of favoring bills of credit. There is no doubt that Virginians whose estates were hopelessly involved, looked to paper money issues for relief and were active Anti-Federalists.<sup>1</sup> In the Carolinas and Georgia the same differences prevailed. The advocates of legal tender laws, there, were Anti-Federalists, and these were generally of the debtor class. In Georgia, the members of assembly who favored paper issues came from the back country, while the opponents of these issues came from the larger towns. In all the States the men who wished to escape paying their taxes and their debts, who, as Hamilton said, would cheat their creditors,<sup>2</sup> were quite without exception, Anti-Federalists.

No truer description of the attitude of the people to the new Constitution has been drawn than by the historian Hildreth. "The federal party with Washington and Hamilton at its head, represented the experience, the prudence, the practical wisdom, the discipline, the conservative reason and instincts of the country. The opposition headed by Jefferson, expressed its hopes, wishes, theories, many of them enthusiastic and impracticable, and more especially its passions, its sympathies and antipathies, its impatience at restraint. The Federalists had their strength in those narrow districts where a concentrated population had produced and contributed to maintain that complexity of institutions, and that reverence for social order, which, in proportion as men are brought into contiguity become necessities of existence. The ultra democratical ideas of the opposition prevailed in all that

<sup>1</sup> Libby, 66-67.

<sup>2</sup> Hamilton's Works (Lodge's Edition), I, 401.

more extensive region in which the dispersion of population and the despotic authority vested in individuals over families of slaves kept society in a state of immaturity and made legal restraints the more unknown in proportion as their necessity was less felt." This description of the two parties in 1801 applies to them with slight modification as they existed at the time of their beginning, when the ratification of the Constitution was the issue between them. When Congress submitted it to the States in 1787, its fate depended upon the relative strength of the paper money men and the sound money men; of the urbane population and the rural population; of the commercial class and of the farming class; of the older communities and of the people in the newer on the frontier.

In Delaware, petitions had been pouring in upon the general assembly,<sup>1</sup> which met on the twenty-fourth of October, that it speedily call a convention to ratify. Early in December, one assembled at Dover, and, almost without debate, freely and entirely approved the Constitution, ratifying it unanimously.<sup>2</sup> But though Delaware was the first to ratify, it was not the first State to convene, for the Pennsylvania convention had assembled on the twentieth of November. The legislature had not waited for the action of Congress.

On the morning following the adjournment of the Federal Convention, the eight delegates from Pennsylvania, headed by Franklin, formally presented the new Constitution to the legislature, and Franklin, in an appropriate

<sup>1</sup> Sharf's Delaware, I, 269; and Pennsylvania Packet, November 17, 1787.

<sup>2</sup> Ratified December 6, signed December 7, 1787; Documentary History, II, 25. The convention consisted of thirty members and among them were Richard Bassett of Kent and Gunning Bedford of New Castle counties, who had been delegates to the Federal Convention.

speech, urged its speedy adoption. The twenty-ninth of September was set as the day of adjournment, but on the twenty-eighth, George Clymer, one of the signers,<sup>1</sup> and also a member of the legislature, moved that provision be made for calling a convention. The Anti-Federalists, who comprised nearly half the legislature, were led by Robert Whitehill of Cumberland county, and Cumberland was anti-federal.<sup>2</sup>

While the question of a convention was under debate, William Bingham, a delegate of the State to Congress, presented himself, with its resolution, unanimously recommending the Constitution to the States, but the Anti-Federalists, still hostile, resorted to obstructive tactics, and absented themselves; for as the Assembly consisted of sixty-nine members, forty-six making a quorum, nineteen absentees could bring the business to a full stop and the House must adjourn.<sup>3</sup> Nineteen members were found only too willing to remain away, so that when the assembly convened, though every federal member was present, there was not a quorum. This was the condition of affairs when Bingham presented his news.

Determined to carry their purpose through, the Federalists, in the House, sent out the sergeant-at-arms to bring in the absentees. Several were found in their lodging houses, and, much against their will, were brought back to their seats. The roll was called, a quorum was counted and the business proceeded. The Anti-Federalists drew up an address to the people, which sixteen of the nineteen signed, setting forth all the defects of the new plan.<sup>4</sup> These were, in brief, its expense; its dangerous

<sup>1</sup> Pennsylvania and the Federal Constitution, 27.

<sup>2</sup> Libby, 84.

<sup>3</sup> Pennsylvania and the Federal Constitution, 60-72.

<sup>4</sup> Id., 73-79; among the signers were Robert Whitehill and Edward Findlay.



grant of power to Congress to levy taxes; its lack of a Bill of Rights, and its organization of a federal judiciary, which would override the State system.

To this accusation there were numerous rejoinders from among the Federalists, of which the most elaborate was written by Pelatiah Webster,<sup>1</sup> a well known pamphleteer, who, nearly five years before, had written a dissertation, urging the States to unite under a common constitution. Having now control of the House, the Federalists quickly passed an act for the election of delegates to the convention to be held the third Tuesday of November.<sup>2</sup> This news was received in the city with every manifestation of joy, but the minority beheld in it only a violation of political principle, and nursing their hostility, laid the foundation of that great party which Jefferson was soon to organize, and which, at the opening of the new century, was ready to take complete control of the government.

Though the Federalists had the better in the argument, which now ran high,<sup>3</sup> the Anti-Federalists depended upon the elections to defeat the Constitution. In Philadelphia and Northampton counties the delegates pledged themselves to support it.<sup>4</sup> Northumberland was divided, but the veterans of the army succeeded in choosing two of their number and thus saved the county for the Federalists.<sup>5</sup> The counties of Franklin and Washington were divided, but if the delegates followed the wishes of their constituents, they would vote against the plan.<sup>6</sup> The six western counties, too, were anti-federal, as were Burks, Dauphin

<sup>1</sup> Id., 89-106.

<sup>2</sup> November 6, 1787.

<sup>3</sup> It is reported more or less fully in Chapters III, V, VI and VII of Pennsylvania and the Federal Constitution.

<sup>4</sup> Libby, 83.

<sup>5</sup> Pennsylvania and the Federal Constitution, 159.

<sup>6</sup> Libby, 83-84.

and Fayette. The convention assembled on the twenty-first of November,<sup>1</sup> and two days later was discussing the Constitution. Among its sixty-nine members was James Wilson, one of the principal authors of the Constitution, and the only signer who had been chosen a delegate.

On the twenty-fourth, Thomas McKean moved for ratification and the debate began.<sup>2</sup> Wilson, utilizing his profound knowledge of the plan, defended it even more cogently than he had done in the Federal Convention.<sup>3</sup> It would give peace to the country; would co-ordinate its interests, and would promote the general welfare, as separate confederacies could not do. As both the States and the citizens were represented in the plan, the States were called upon to give up a portion of their power for the good of the whole. It was founded on the principle of representation. The Federal Convention had found it difficult to draw the line between the national and State government. Whatever objects of government were confined in their operation and effect within the bounds of a State should be considered as belonging exclusively to its government, but whatever extended beyond the bounds of a State should be considered as belonging to the government of the United States. The new plan would limit the power of legislation; the supreme authority for the government rested in the people. As he had so frequently

<sup>1</sup> Pennsylvania and the Federal Constitution, 211.

<sup>2</sup> The convention met on November 21, chose Frederick Augustus Muhlenberg President, and James Campbell (November 23) Secretary.

<sup>3</sup> He had made a great speech, known as the State House speech, on the Saturday evening preceding the election. A great concourse of people had met to nominate representatives for the ensuing general assembly. This speech ranks with the essays in the Federalist in spirit and tone; see Pennsylvania and the Federal Constitution, 143-149.

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Smilie replied that the purpose of McKean's motion was altogether too hasty. The new plan should not be forced on the convention. Whitehill, of Carlisle, feared lest the rights and liberties which the people ought never to surrender were to be handed over to the new government.<sup>2</sup> Objection was made to the omission of a Bill of Rights, but Wilson replied, that the preamble of the Constitution contained the essence of all the Bills of Rights that could be devised,<sup>3</sup> because it established the principle that the people have a right to do what they please. But this in no wise satisfied the opposition, who, led by Smilie of Fayette, insisted that a more particular Bill was necessary. McKean, with some violence to history, replied that but five of the thirteen State constitutions had such Bills,<sup>4</sup> and argued that, though a Bill could do no harm, it was unnecessary because the whole plan of government proposed was nothing more than a Bill of Rights.<sup>5</sup> Wilson explained that the necessity of a Bill of Rights had never occurred to a member of the Federal Convention until three days before its dissolution, and even then the subject was not debated.

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Smilie labored to prove that the new plan would terminate in a consolidation and confederation of the States,<sup>3</sup> and, like Rome, would end in tyranny. To this McKean's assertion was considered by the Federalists a sufficient reply. But to the objection that the House of Representatives was too small, Wilson made answer, that the Convention had found the subject embarrassing, and after considering the question of expense, in connection with numbers, had endeavored to steer a middle course. On the basis finally agreed to, one member for every thirty thousand inhabitants, it was believed that every local interest would be fully represented.<sup>4</sup>

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Constitution upon its invasion of the sovereign rights of the States. Its adoption would establish a consolidated, not a federal government. The preamble was wrong in using the phrase "we the people" instead of "we the States." The basis of representation was wrong in being founded upon population instead of the equal State sovereignties. To give Congress power to levy internal taxes must destroy these sovereignties, for two independent taxing powers could not exist in the same community; the stronger, of course, would annihilate the weaker. The power given to Congress to regulate and judge of elections was a proof of consolidation, as also were the organization of the judiciary, the manner of paying the members of the legislature, and the oath of allegiance which the Constitution required.<sup>1</sup> Here was the critical question, whether, as Wilson expressed it, the boasted State sovereignties were to be disrobed of part of their power.

Going to the root of the matter, he denied that the State governments were sovereign, for sovereignty resides in the people; they had not parted with it; neither would they part with it in authorizing the new Constitution. That the new government would take some particular powers from the State governments no one could deny, yet both the States and the people were to be represented. It was true that there were to be two taxing powers, but the people in each were to appoint their representatives. The new system abounded in restraints, the chief of which was the people themselves. But the system of checks and balances was so carefully applied that there was no danger of the abuse of power by any department; each would serve as a check upon the other.<sup>2</sup>

<sup>1</sup> Id., 300-301.

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The Anti-Federalists were far from convinced. The Vice-President, they said, would be a dangerous officer, and, as he had a casting vote, might fix his own salary. The Senate should not be empowered to make treaties, or to try impeachments. The organization of the judiciary was wholly faulty, as it entirely subordinated the States and reduced them below the dignity of sovereigns. The debate was full of personalities, and occasionally the debaters almost came to blows.<sup>1</sup> How could the Federalists defend a Constitution that made no provision for a trial by jury? Judge McKean might look wise, but this would not remove the objections, and he was overwhelmed by citations from history and law to prove that his position was wrong. But he knew the strength of his party and, on the tenth of December, after reviewing all the objections, he declared that, from a full examination of the system, it appeared to him the best that the world had seen;<sup>2</sup> and announcing that Delaware had ratified, he gave notice that on the twelfth he should call for the vote.<sup>3</sup>

On the following day, Wilson made a powerful speech answering all the objections that had been made and practically closing the debate. He declared that the new system was not a compact or a contract, but an ordinance, an establishment of the people;<sup>4</sup> thus returning again to the principle on which he had based all his arguments.<sup>5</sup> But in spite of all the speeches of the Federalists, the Anti-Federalists were not convinced, and at the close of Wilson's argument, Findlay briefly reviewed the defects of the plan, and Whitehill presented several petitions from

<sup>1</sup> Id., 359.

<sup>2</sup> Id., 366-379.

<sup>3</sup> Id., 364.

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On the following day, Wilson made a powerful speech answering all the objections that had been made and practically closing the debate. He declared that the new system was not a compact or a contract, but an ordinance, an establishment of the people;<sup>4</sup> thus returning again to the principle on which he had based all his arguments.<sup>5</sup> But in spite of all the speeches of the Federalists, the Anti-Federalists were not convinced, and at the close of Wilson's argument, Findlay briefly reviewed the defects of the plan, and Whitehill presented several petitions from

<sup>1</sup> Id., 359.

<sup>2</sup> Id., 366-379.

<sup>3</sup> Id., 364.

<sup>4</sup> Id., 385.

<sup>5</sup> See his speech, Id., 379-418.

the people of Cumberland, having in the aggregate seven hundred and fifty signatures, praying that the Constitution should not be adopted without amendments, and particularly a Bill of Rights. These petitions, drawn in the form of fifteen articles, were then put to vote, but were rejected,<sup>1</sup> and the Constitution was then ratified by the same vote.<sup>2</sup> Assembling on the thirteenth the majority agreed that the convention should proclaim the ratification of the Constitution before it was signed and this was accordingly done. A procession was formed, consisting of the President and Vice-President of the State, members of Congress, the faculty of the University, and the magistrates and militia officers of the county and city. Moving amidst a great concourse of people, it proceeded to the Court House, where the ceremony of ratification was completed.<sup>3</sup> The proceedings of the day came to an end with a grand dinner, at which the Federal members vied with one another and their guests in responding to appropriate toasts, of which the first was "The people of the United States."

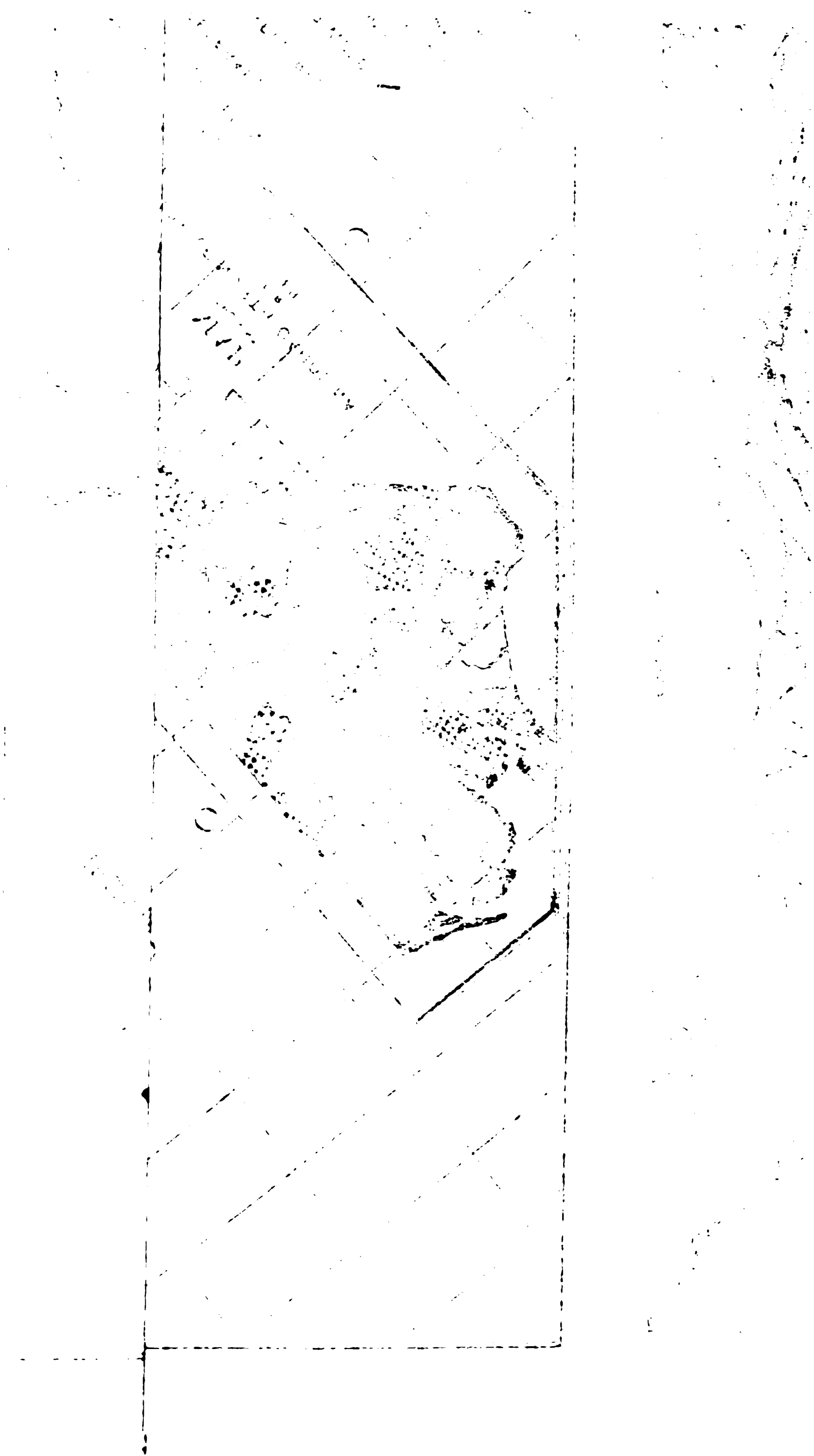
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the basis of Madison's report of twelve amendments in Congress in 1789, but the claim is not well founded.<sup>1</sup> Before adjourning, the convention, on the fifteenth, offered to cede to Congress, as the seat of the Federal City, the jurisdiction over any place in Pennsylvania, not exceeding ten miles square, excepting the city of Philadelphia and two adjoining districts, and until Congress might choose a permanent seat of government for the United States, it might have the use of such public buildings, within the city of Philadelphia, or elsewhere in the State, as it might find necessary.<sup>2</sup>

Though the convention had refused the proposed amendments to the Constitution, the minority did not cease to insist upon them. The very refusal of the convention to receive them confirmed opinion in the State that they were necessary. At Harrisburg, in September of the following year,<sup>3</sup> in response to a circular letter, which originated in the county of Cumberland, thirty-three delegates, representing thirteen counties, including in their number Robert Whitehill, John Smilie and Albert Gallatin, concluded a conference by drawing up twelve amendments which they insisted should be made to the new Constitution.<sup>4</sup>

There is little doubt that the Harrisburg conference more faithfully reflected public opinion in Pennsylvania than did the ratifying convention. Pennsylvania politics would have been far less bitter during the years following

<sup>1</sup> The extent to which Madison made use of the amendments proposed by the Pennsylvania minority may be seen from the notes to the Chapter narrating the history of the first ten amendments, post, pp. 199-211.

<sup>2</sup> Id., 430.

<sup>3</sup> September 3, 1788.

<sup>4</sup> Id., 558-564. The provisions in these amendments which were finally incorporated in the twelve which Madison submitted to Congress in 1789 are indicated in the notes on the first ten amendments; see post, pp. 199-211.

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asserted, that the one proposed was the best which had been offered to the world. This speech of Wilson's, on the twenty-fourth of November,<sup>1</sup> crystallized public opinion in southeastern Pennsylvania, and furnished the arguments which the Federalists all over the State advanced later. It began a discussion which outlasted the ratifying conventions. The anti-federal campaign begun by Lee soon took the form of pamphlet and newspaper articles in prose and verse, broad-sheets and caricatures. The lexicon of contemptuous epithets was exhausted upon Franklin and Washington, and especially upon Wilson.<sup>2</sup> But at the bottom of all this virulence there was unquestionably some cause of alarm. The anti-federal members of the convention had asked for a Bill of Rights, and their demand was eminently reasonable.

Unless the doctrine was admitted that the new government was to be one of delegated powers, construed as the Federalists and their political successors were never willing to construe it, the fifteen amendments which the ratifying convention rejected by a vote of two to one, contained little that was objectionable. The demand of the Anti-Federalists that the President be given a constitutional council; that the sovereignty, freedom and independence of each State should be declared to be retained, except as expressly delegated to the United States, and the limitation of the power of the Federal judiciary were of value. The demand that Congress be restrained to the imposition of duties on exports and imports and to the postage on letters, leaving the States otherwise free to tax, may seem superfluous, and also the declaration of the right of the people of the States to fowl, hunt and fish. Doubtless

<sup>1</sup> Pennsylvania and the Federal Constitution, 142-149.

<sup>2</sup> Many of these are reprinted in Pennsylvania and the Federal Constitution.

these unimportant demands would have been surrendered, if the Federalists would have accepted the other amendments submitted as necessary to secure the rights afterward guaranteed in the first ten.<sup>1</sup>

That these amendments met the approval of the mass of the people in Pennsylvania is shown from the zeal and alacrity with which they took them up. A campaign agitating their adoption began in July, 1788, in Cumberland county, spread over every county, excepting York and Montgomery, and, in September, culminated in the Harrisburg convention. This campaign is traceable to the anti-federal friends of Robert Whitehill of Cumberland, but no man was more active in it than Albert Gallatin, who personified the hostility of the western part of the State to the new plan. The Harrisburg conference, coming after eleven States had ratified, gave expression to that demand for a second convention, which Randolph had made in Philadelphia, which was taken up by the Anti-Federalists generally, and was embodied finally in the circular letter sent out by Governor Clinton of New York. The twelve Harrisburg amendments and the fourteen offered by the Anti-Federalists in the Pennsylvania convention, represented the wishes of the people of the State quite as completely as if they had been adopted by the ratifying convention. But the manner in which they came up was extra-conventional and they were nothing more than the resolutions of a political mass-meeting. They were based on the doctrine of State sovereignty, and those of Harrisburg were chiefly administrative in character, but, altogether, they disclosed a state of public feeling, which, when the new government was organized, it

<sup>1</sup> For the amendments proposed by the Anti-Federalists, see Pennsylvania and the Federal Constitution, 421-423, 461-463.

was careful not to ignore.<sup>1</sup> It was upon these amendments and all that they imply that the hostility toward the new government rested, which, at last, culminated in the whisky insurrection in western Pennsylvania.<sup>2</sup>

In New Jersey, public opinion was so outspoken for the Constitution that there was no doubt of its ratification.<sup>3</sup> The people of that State were convinced that nothing short of such a government as it proposed would save the State and the whole country from absolute ruin.<sup>4</sup> On the twenty-ninth of October, its legislature unanimously recommended its inhabitants to choose three delegates from each county to assemble in convention, at Trenton, on the second Tuesday in December.<sup>5</sup> David Brearly, of Hunterdon County, was the only delegate chosen who had belonged to the Fed-

<sup>1</sup> See Chap. VI, post.

<sup>2</sup> As a great portion of these amendments were incorporated in the first ten adopted two years later, their authorship is of more than passing interest. The minority which reported them, December 12, 1787, consisted of John Whitehill of Lancaster; John Harris, John Reynolds, Robert Whitehill, Jonathan Hoge, all from Cumberland; Nicholas Lutz, John Ludwig, Abraham Lincoln, John Bishop and Joseph Hlester of Berks; James Martin and Joseph Powell of Bedford; William Findlay, John Baird and William Todd of Westmoreland; James Marshall and James Edgar of Washington; Nathaniel Breeding and John Smilie of Fayette; Richard Baird of Franklin, William Brown, Adam Orth and John A. Hana of Dauphin. The Abraham Lincoln here mentioned was a great-great-uncle to the President; see Tarbell's *Early Life of Lincoln*, pp. 226-227. He was a delegate from Berks county to the Constitutional Convention of Pennsylvania in 1789, as were also Robert Whitehill, Joseph Helster, Joseph Powell, William Findlay, William Todd, John Smilie, William Brown, Albert Gallatin, James Wilson and Thomas McKean; see the Minutes of this convention, 138.

<sup>3</sup> Gouverneur Morris to Washington, October 30, 1787.

<sup>4</sup> Libby, 85. *Massachusetts Gazette*, November 13, 1787.

<sup>5</sup> Minutes of the Convention of the State of New Jersey, Holden at Trenton, the Eleventh Day of December, 1787, Trenton, MDCCCLXXXVIII, 25.

eral Convention.<sup>1</sup> On the eleventh of December, the delegates met, and, after discussing the Constitution, article by article, a week later, gave it their unanimous approval.<sup>2</sup> Like the Pennsylvania convention, this of New Jersey offered to cede to Congress a Federal District for the seat of the general government. The convention suggested no amendments. When every member in attendance had signed<sup>3</sup> the convention went in procession to the Court House, where the secretary<sup>4</sup> read the ratification in the hearing of the people.

While these ratifications were in progress at the north, the people of Georgia, at the far south, were approving the new plan with even greater unanimity. The delegates, among whom was William Few of Richmond county, who had been a member of the Federal Convention, met on Christmas day, at Augusta, and devoted a week to a careful examination of the Constitution, and on the second day of January ratified it unanimously. The joy and happiness of the hour were expressed by a salute of thirteen guns.<sup>5</sup> The news of ratification at the North had not yet reached Georgia. Its people had acted independently and for their own and the general welfare.<sup>6</sup>

In Connecticut many of the towns voted directly upon the question of ratification,<sup>7</sup> and the principal ones were

<sup>1</sup> Thirty-nine delegates were chosen, all of whom attended save one; among the members were John Witherspoon, a signer of the Declaration, Frederick Frelinghuysen and John Steven of Hunterdon, who was chosen president, and Mathew Whillden.

<sup>2</sup> The form of ratification was drawn by Judge Brearly. *Minutes*, pp. 25-26; *Documentary History*, II, 46.

<sup>3</sup> December 19.

<sup>4</sup> Samuel W. Stockton.

<sup>5</sup> *Steven's Georgia*, II, 386-388.

<sup>6</sup> For the ratification see *Documentary History*, Vol. II, 65-85. The convention consisted of twenty-five members; John Wereat was president and Isaac Brigg, secretary.

<sup>7</sup> See the list in Libby, 79.

unanimous in its favor.<sup>1</sup> The delegates to the ratifying convention, one hundred and sixty-eight in number, chosen in conformity with the unanimous act of the legislature, of the sixteenth of October,<sup>2</sup> were for the most part instructed to vote for the new Constitution. Among them were Ellsworth, Sherman and William Samuel Johnson, who had been delegates to the Federal Convention, and the entire membership included the most eminent public men in the State.<sup>3</sup>

Sherman and Ellsworth, in a joint letter to Governor Huntington, remarked that though Congress, under the new Constitution, would be differently organized than under the Articles, yet the representation from Connecticut would not be changed. The equal representation of the States in the Senate, and the participation of that body in appointments to office, would secure the rights of the lesser as well as the greater States. The principal object which the States had in view in appointing the Philadelphia convention had been to vest additional powers in Congress, yet it would be found that these extended only to matters affecting the common interests of the Union, and that they were specially defined, so that, in all other matters, each State would retain its sovereignty.

The Constitution would be found not to differ from the Articles in its enumeration of objects for which Congress might legislate,—namely, the common defense, the general welfare and the payment of the public debt. The principal branch of revenue would probably be from duties on imports. The restraint on the State legislatures, forbidding them to emit bills of credit or to make anything

<sup>1</sup> Connecticut Courant, November 26, 1787.

<sup>2</sup> Documentary History, II, 86.

<sup>3</sup> Among them were Nathan Griswold, chosen president of the convention, Jeremiah Wadsworth and Governor Samuel Huntington.

but money a tender in payment of debts, or to impair the obligation of contracts by *ex post facto* laws, was thought necessary and a security to commerce, in which the interest of foreigners, as well as of the citizens of different States, might be affected. The energy of the general government, on the one hand, and suitable checks on the other, had been provided in order to secure the rights of the States and the liberties and property of the citizens.<sup>1</sup> The convention assembled in the State House in Hartford on the third of January, 1788, but soon adjourned to the North Meeting House, where it entered upon a discussion of the Constitution, section by section.

Ellsworth, speaking of the plan as a whole, showed that it would be economical by preserving peace among the sections of the country and by uniting them for their common defense.<sup>2</sup> It would promote justice and, by its coercive power, give the general government adequate energy. Treaties would be fulfilled, the public debt paid, and Connecticut would be exempted from the imposts which it annually paid to Massachusetts and New York. In brief, the Constitution was a complete system of legislative, judicial and executive power.<sup>3</sup> Continuing his speech, Ellsworth met the objections urged against the general power of Congress to lay and collect taxes,—namely, that it was too extensive and partial and that it should not be granted to Congress at all.

The objection was expressed briefly in the phrase of the day “the union of the sword and the purse.” His argu-

<sup>1</sup> Sherman and Ellsworth to Governor Huntington, September 26, 1787; Elliot, I, 491.

<sup>2</sup> Ellsworth's remarks throughout were the same as those in the first thirty numbers of the *Federalist*. As in the *Federalist* so most of the illustrations used by Ellsworth were taken from the ancient confederacies and the actual workings of the State governments.

<sup>3</sup> Elliot, II, 185-190. January 4, 1788.

ment had already been made in the Federal Convention, and now was summed in the remark, that unless Congress was given the power of taxation, a single State would control the Union and the minority would govern.<sup>1</sup> Wolcott pointed out that the Constitution would effectually secure the States in their several rights, using language almost identical with Wilson's in his speech in the State House yard in Philadelphia.<sup>2</sup>

General Wadsworth feared lest the power of taxation granted to Congress might be used to discriminate against the South or against the North, and particularly might bear hard upon the importing States. This objection, Ellsworth proved, was unfounded. Nothing was to be omitted from taxation. Imported blacks were to be subjected to a duty. That the North would not pay all the imposts was clear, for though the exports from Virginia were valued at a million sterling a year, the payment did not come back in money; "for in money," said he, "the Virginians are poor to a proverb. They anticipate their crops, they spend faster than they earn, they are ever in debt. Their rich exports return in articles to eat, to drink and to wear, and all are subject to the imposts." Maryland was like Virginia. The imports and exports of the South, then, would be quite as great as those of the North.<sup>3</sup> On the ninth of January, the vote was cast, the Constitution was agreed to, and was signed by one hundred and twenty-eight members. Forty-eight delegates voted against it.<sup>4</sup> No amendments were proposed. Thus in its formal action, Connecticut stood side by side with the four States which had already ratified. Meanwhile four other States had been taking action.

<sup>1</sup> Id., 190-197. January 7, 1788.

<sup>2</sup> Id., 201-202.

<sup>3</sup> Id., 194.

<sup>4</sup> Documentary History, II, 86-89.

## CHAPTER II.

### RATIFICATION BY MASSACHUSETTS, MARYLAND, SOUTH CAROLINA AND NEW HAMPSHIRE.

The attitude of the people of Massachusetts toward the Constitution was shown in the votes of the towns<sup>1</sup> when the question of electing delegates to the ratifying convention came up. The legislature, in October, had authorized a convention, the act passing with little opposition.<sup>2</sup> The motion in the Senate was made by Samuel Adams, and in the House by Theophilus Parsons, both of whom, later, were chosen delegates. The vote in the towns showed plainly the trend of public sentiment, which in many instances, amounted to an instruction of the delegates. In the district of Maine many towns voted directly on the question of instruction, and there the sentiment toward the new plan was generally favorable. So was it in eastern Massachusetts, but the central and more western towns were less friendly. The State had not yet recovered from the shock of Shays's rebellion; business was much prostrated, and public credit, though at heart sound, was low. It was not the most opportune time for the consideration of the great question of the hour, yet, if Massachusetts should ratify at such a time of despondency, the ultimate fate of the Constitution would not be in doubt.

The convention assembled, at Boston, on the ninth of January, 1788. Among its three hundred and sixty-four

<sup>1</sup> Libby, 75-78. Samuel Bannister Harding's, *The Contest Over the Ratification of the Federal Constitution in the State of Massachusetts*, 49-58.

<sup>2</sup> October 25, 1787. The vote in the House was a majority of 129 out of 161. *Massachusetts Convention* (Boston Edition, 1856), 21. Harding, 46-48.



members were King, Gorham and Strong, who had represented the State in the Federal Convention. Elbridge Gerry, who had refused to sign, was rejected for Francis Dana, by the voters of Cambridge, and Nathan Dane, who, with Lee and Melancton Smith, had labored in Congress to defeat the new plan, was now defeated by George Cabot as a delegate from Beverly. It was the largest convention that met in any State; was composed of men of all professions and occupations, and included nearly twenty, who had served in Shays's army the year before.<sup>1</sup> Among the members were John Hancock, James Bowdoin, Fisher Ames, Samuel Holden, Stephen Longfellow, Theodore Sedgwick, Christopher Gore, Benjamin Lincoln and William Heath,—all distinguished for their services to their country. Seventeen clergymen, representing Protestant denominations in the commonwealth, were chosen. John Hancock, the governor, was made President. The State House in Boston being unsuitable for the meeting of so large a body, the delegates accepted the invitation of the proprietors of the Meeting House in Brattle street to use it during their session, and the name of the street was soon afterward changed to Federal street, in commemoration of the most important event in its history.

The Constitution was already more or less familiar to the people, as it had been repeatedly published in the newspapers and in pamphlet form.<sup>2</sup> Probably most of the men in the State who could read had seen it. There was no disposition in Massachusetts, as in Pennsylvania and New York, to reject the plan simply because it was intended to supplant the old Confederation. Even the men lately in insurrection under Shays, believed that affairs

<sup>1</sup> Harding, 59.

<sup>2</sup> First published in the *Massachusetts Centinel*, September 26, 1787. For other papers see Harding, 15.

could be no worse than they were, and therefore, they inclined to give the plan a favorable hearing. The Boston merchants were outspoken in its favor. Had the people of the State been left to themselves, opposition would have been less active; but Richard Henry Lee's Letters of a Federal Farmer and the anti-federal writings that came up from Pennsylvania were circulated with great effect.<sup>1</sup> Elbridge Gerry had published his reasons for not signing the Constitution, and contributed to swell the discontent.<sup>2</sup> It is said that he composed his objections at New York, in association with Richard Henry Lee.<sup>3</sup> His dissent was chiefly to the clauses on representation and election; to those on the powers of Congress, as ambiguous and dangerous; to the confusion of executive and legislative functions; to the oppression latent in the judicial department; to the method of making treaties, and to the absence of a Bill of Rights. No Anti-Federalist could say more.

Gerry furnished ammunition for the anti-federal newspapers and pamphleteers. The Federalists accused the authors of all those writings of a lack of candor, but they could not accuse them of lack of style or power of expression. The concensus of anti-federal opinion was on the omission of the Bill of Rights. No more skillful attack appeared than in a series of articles in the *American Herald*, during the last quarter of 1787.<sup>4</sup> These prophesied not only the destruction of the Confederation, but the substitution of tyranny in its place. The new government was to be given unlimited power to tax and make collec-

<sup>1</sup> Id., 17. These were by Brutus; Centinel; Cincinnatus. See Pennsylvania and the Federal Constitution, Chapters III, VI and VII.

<sup>2</sup> For Gerry's objection see Elliot, I, 492-494; Massachusetts Convention, 1788, Edition 1856, 24.

<sup>3</sup> Harding, 19.

<sup>4</sup> Signed, John deWitt; Harding, 24-28.

tions by its own officers, armed with military power. The federal courts were only a device to make the whole process legal. Evidently the intention of the Federalists was to establish a pure aristocracy.

The objection already familiar in Pennsylvania, that ratification would violate the State constitutions, was repeated in Massachusetts.<sup>1</sup> Property and not persons was to be made the basis of government: an objection which anticipated the great reform of 1820,<sup>2</sup> in Massachusetts. The clause giving the control of elections to Congress, wrenched from its relations in the new plan, was made a text for ceaseless attack. The prospective annihilation of the State governments; the equality of the States in the Senate; the prohibition of the issue of bills of credit by the States, and, above all, the neglect to secure freedom of the press and religion, were evils too grievous to be borne.<sup>3</sup>

The election of Hancock as President of the convention was carried by the Federalists in hopes that he would throw the weight of his influence on the side of the new plan. His health was bad, politically, and the more ardent Federalists did not conceal their belief that both his presence in the convention and his vote would be delayed until the opinions of the majority were clear. The three delegates of Massachusetts in the Federal Convention, Gorham, Strong and King, were the Federal leaders and were aided by the revolutionary veterans Bowdoin, Heath and Lincoln, and the younger, and more energetic, Sedgwick,

<sup>1</sup> Id., 29.

<sup>2</sup> See *Proceedings and Debates of the Constitutional Convention of 1820*, and specially the speeches of Daniel Webster and Levi Lincoln on "the basis of government."

<sup>3</sup> These anti-federalist writings are carefully summarized by Mr. Harding, 28-44; by whom the local authorities are given in detail.

Parsons and Ames.<sup>1</sup> With great skill the Federalists, who were by no means confident of their strength to control the convention, succeeded in neutralizing the secret opposition of Samuel Adams, the most influential member of it, and able, if he chose, to defeat the constitution in Massachusetts. Gerry, who had been defeated as a member, was asked, at the instigation of the Anti-Federalists, to take a seat on the floor, that he might give information. When the question of an equal representation in the Senate came up, and there were many differences of opinion, he, unasked, offered some information, which only fanned the discord and resulted in his absence from the convention from that time.<sup>2</sup>

The Anti-Federalist leaders were less distinguished than the Federalist. Chief of them was William Widgery, of New Gloucester, Maine, a self-made man, of strong natural abilities, of a roughly democratic type. Equally ardent were Samuel Thompson and Samuel Mason, also of the district of Maine, the one a brigadier-general of the militia; the other a saddler by trade. Both were aggressive men, and chafed under parliamentary rules. Joined with these were John Taylor of Worcester county, a pronounced advocate of tender laws, and Captain Phaniel Bishop, of Bristol county,<sup>3</sup> lately active in support of Daniel Shays. The leaders were types of their respective parties; wealth, learning and social position on the one side; natural ability, energy, and aggressive democracy, on the other. The convention, when it first assembled, was undoubtedly anti-federal. The Federalists soon found that they had claimed too much, and they at once changed their policy: the vote should, if possible, be de-

<sup>1</sup> Elliot, V, 572.

<sup>2</sup> Debates, 100, 65-75.

<sup>3</sup> Elliot, V, 572.

layed, until the wavering members could be won over; therefore, they avoided everything that might irritate their opponents. Because the Anti-Federalists were so strong, the discussions were prolonged and exhaustive. In the Pennsylvania convention, the Federalists, conscious of their strength, had ridden rough-shod over their opponents. The Massachusetts Federalists were compelled to use caution and treat their opponents with respect. The Constitution was read, paragraph by paragraph that every member might have opportunity to express his sentiments; and then the whole plan was debated under the general question of ratification. This program was liberally carried out.<sup>1</sup>

The objections to the plan were not new, and most of them had come up in the Federal Convention. Massachusetts was the citadel of annual elections, as it still is, and the Anti-Federalists made much of the differences between this local custom and the method proposed in the Constitution. Strong explained that the biennial provision was the result of a compromise between the party for one, and that for three years; a compromise between the Massachusetts and the South Carolina method.<sup>2</sup> Ames defended biennial elections not as a compromise, but on the principle that they were better adapted to a country so extensive as our own, and to a government whose objects of legislation would be such as those arising under the new plan; indeed, the new method would more perfectly secure our liberties.<sup>3</sup> But the compromise and the arrangements of a federal cast in the plan, did not satisfy Thompson and Bishop, both of whom de-

<sup>1</sup> Debates, 100, 103.

<sup>2</sup> Id., 103.

<sup>3</sup> Id., 106.

nounced biennial elections as perilous to public interests.<sup>1</sup> One Anti-Federalist would have a property qualification,<sup>2</sup> and pay the members of Congress from the State treasury; another insisted upon a religious test in order to exclude Roman Catholics, but not one of the seventeen clergymen present favored the proposed exclusion.<sup>3</sup> It seems somewhat paradoxical that a demand for a property qualification should have been made by an Anti-Federalist, and that a Federalist<sup>4</sup> should have declared that the objection was founded on undemocratic principles.

Protection to slavery and the slave trade furnished the Anti-Federalists many arguments, expressed summarily by Widgery, who remarked that one southern man with sixty slaves would have as much influence as thirty-seven freemen in New England.<sup>5</sup> As in the Pennsylvania convention so here, the chief objection to the plan was to the power which it gave to Congress. Thomas Dawes, of Boston, argued,<sup>6</sup> that Congress should be given power to encourage manufactures. But this idea which was destined to become a dominant principle of a great political party, in later years, alarmed the Anti-Federalists. It was not perfectly clear, to the majority of the friends or the opponents of the Constitution just how a government could derive an income from a tariff and not burden the people.

The Americans at this time were familiar with direct taxes and quotas, but they had not yet pursued the sinuous ways of indirect taxation; thus a familiar argument with

<sup>1</sup> Id., 113, 121.

<sup>2</sup> Id., 133.

<sup>3</sup> Id., 251.

<sup>4</sup> Theodore Sedgwick, Id., 133. For the part Sedgwick played in bringing about the adoption of the eleventh amendment, see p. 289.

<sup>5</sup> Id., Parsons' Minutes, 303..

<sup>6</sup> Id., 158.

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<sup>6</sup> Id., 158.



the Anti-Federalists was the probable inability of the new government to raise sufficient revenue by tariff, and, consequently, the necessity it would be under to tax land and personal property.<sup>1</sup> Undoubtedly this favorite Anti-Federal objection was inevitable, but as yet a tariff had not been tried. It is not strange that men, who, like the majority of the Americans, at this time, were obliged to work hard for a living, and whose annual income was not on an average much above two hundred dollars a year, should view, with alarm, the grant of power to Congress to levy and collect taxes at its discretion. This distrust of delegated power was well founded and lay at the bottom of all the Anti-Federal arguments against the legislative department.<sup>2</sup> Many Federalists shared it. Yet, carried to an extreme it would destroy all government.<sup>3</sup>

Local antagonisms divided the members into the agricultural and the commercial party. The New England farmers habitually believed that the merchants, in the large towns, led a very easy life and nowhere was this conviction stronger than in rural Massachusetts. Out of it grew another belief, equally potent, that whatever the merchants favored, would be autocratic, and that true democracy was to be found in the thoughts of the farmers.<sup>4</sup> The industrial seam ran all along the coast dividing the tillers of the soil from the shop-keepers,—the countrymen from the townspeople. Richard Henry Lee had his audience in mind when he wrote his *Letters of a Farmer*. So *Centinel* in his letters to the people of Pennsylvania,<sup>5</sup> told them that the new government was intended for the

<sup>1</sup> Id., 203.

<sup>2</sup> Harding, 74.

<sup>3</sup> Knox to Washington, February 10, 1788; Id., 409; Harding, 74.

<sup>4</sup> Harding, 75.

<sup>5</sup> Pennsylvania and the Federal Constitution, 626-628.

well born and would degrade the freemen of the State. It was the rich man's plan, devised to rob the poor man, and all who labored for their bread. This notion was echoed in other States. In Massachusetts the Anti-Federalists hastened to point out that its truth was corroborated by the class of men who supported the new plan; the lawyers, the clergy, the judges and the rich merchants.<sup>1</sup> Thus the contest over the ratification of the Constitution, as it was more or less elsewhere, was a contest between classes.

But not all the plowmen were Anti-Federalists. Jonathan Smith, of Berkshire county, who declared himself a plain man, who got his living by the plow, came from a part of the State which had been harrowed by Shays and his followers. He described the terrible effects of that insurrection. One of the Anti-Federal leaders tried to cut him off, as he vividly described the robberies, the burning of farm buildings, the alarm from town to town, and the breaking up of families, which the insurrection had caused. But Samuel Adams declared Smith in order, and told him to go on in his own way. It led to the conclusion that anarchy breeds tyranny.<sup>2</sup> He had made a strong plea for the federal cause, but had not removed the suspicion that the new plan was essentially autocratic.<sup>3</sup> Then, too, the paper money men and the friends of the tender laws opposed the new plan; for they saw in it the end of their schemes. Here was a serious obstacle in the way of the Federalists; but here lay the strength of the opposition.<sup>4</sup> The inhabitants of Maine desired separation, and the delegates from this part of the State read in the clause regulating the organization of new States or

<sup>1</sup> Harding, 76-77; Debates, 409.

<sup>2</sup> Debates, 204.

<sup>3</sup> Harding, 78.

<sup>4</sup> Harding, 43, 79.

parts of old ones a serious if not a fatal delay of their wishes.<sup>1</sup> So most of the Maine delegates were opposed to the Constitution.<sup>2</sup>

The policy of the Anti-Federalists was to postpone the vote; adjourn the convention and await the decision of other States. Thus they all declaimed against undue haste. The new plan, they said, instead of being an amendment to the Articles of Confederation was a wholly different government; therefore, allow the people time for reflection before asking them to approve it.<sup>3</sup> The worst feature of this objection was the power of the Anti-Federalists to carry it through. It had been agreed at the opening of the session that the discussion should be by sections, until the whole Constitution had been considered. The convention was now amidst the powers of Congress, when on the twenty-third of January, Mason proposed that the form of procedure, by paragraphs, should be abandoned; that the whole instrument be discussed on its merits, and the vote on ratification be taken.<sup>4</sup> This was alarming, but on the following day, happily

<sup>1</sup> When in 1819, separation was finally agitated, the Federalists opposed it; for an account of the separation see my *Constitutional History of the American People, 1776-1850*, II, Index "Maine." See the Debates and other proceedings of the convention of delegates assembled at Portland on the 11th and continued until the 29th of October, 1819, for the purpose of forming a constitution for the State of Maine, to which is prefixed the constitution taken in convention by Jeremiah Perley, Counsellor-at-law, Portland; A. Shirley, Printer, 1820, 300 pages; *Journal of the Convention*, Augusta, 1856, 112 pages; *The Debates and Journal* (reprint), Edited by Charles E. Nash, Augusta, Maine, Farmers' Almanac Press, 1894. This also contains the Brunswick Convention of 1816 and biographical sketches of its members and of those of the convention of 1819.

<sup>2</sup> Harding, 81.

<sup>3</sup> Debates, 160-161.

<sup>4</sup> Debates, 195.

for the Federalists, Samuel Adams spoke against the proposition and it was defeated. The Anti-Federalists were remarking that it was time they were going home to attend to their work, but Adams answered that this was not the time to desert public interests for private concerns. It would be better, he said, to lend the money which any of the country members needed rather than hurry so great a subject.

Adams's opposition was somewhat unexpected and was greeted with mingled applause and hisses,<sup>1</sup> but it showed where he stood. It showed more; namely, that if the Constitution was to be ratified, the Federalists must come to some terms with their opponents. In Pennsylvania the Federalist majority of two to one had made such terms unnecessary, though even there the political effect would have been highly advantageous. In Massachusetts a compromise was absolutely necessary. Opposition must be quieted by conceding to amendments covering the more serious objections. These should be adopted in the form of a recommendation to Congress, but ratification should not be conditional upon their final incorporation into the Constitution. It appears that this procedure was contemplated early in the session, indeed, within the first week.<sup>2</sup> The exact source of the scheme is unknown, but probably it occurred to several of the Federal leaders, all of whom were practical politicians. Its successful operation involved some difficulties, not the least of which was the adroit management of Hancock.

As yet he had not appeared. His gout, which, John Adams said, always overtook him when there was anything unpopular or unpleasant for him to do, had kept

<sup>1</sup> Debates, 197.

<sup>2</sup> Harding, 84; Massachusetts Centinel, January 12, 1788; Avery and Thatcher, January 19.

him at home.<sup>1</sup> King observed that as soon as the majority on either side was beyond doubt, Hancock's gout would disappear. But his support was essential to the Federalist scheme. He desired a re-election as governor. His chief competitor was James Bowdoin, but Bowdoin's friends in the convention persuaded themselves that under some circumstances they could support Hancock; there must be a President and a Vice-President chosen under the new plan; the political opportunity was ample; and it was soon known that Hancock would not disappoint federal expectation. If for a few days his caprice could be restrained, the Constitution would be ratified in Massachusetts.

A strong alliance of the Bowdoin and Hancock men was made, and King records that in case Virginia did not ratify, Hancock would become a fair candidate for President.<sup>2</sup> That a bargain was made is beyond doubt. Hancock was made to believe that his re-election as governor was secure, and that he should at least become Vice-President.<sup>3</sup> His gout yielded to this skillful treatment; he took his seat as chairman of the convention on the thirtieth of January, and on the following day, General Heath made a politic speech preparatory to the coming transformation. After remarking on the momentous importance of the subject before the House and the exhaustive discussion which it had received, he observed that many appeared to be opposed to the system, not as a whole, but to particular parts. Was there not a way in which their minds might be relieved of embarrassment, for certainly if there was, no exertion should be spared in that direction. If the convention should ratify the Constitution, and in-

<sup>1</sup> Until January 30; Harding, 85.

<sup>2</sup> Life of King, I, 319; Harding, 86.

<sup>3</sup> Harding, 87.

struct the first members to Congress to exert their utmost endeavors to have such checks and guards provided in some of the paragraphs, as seemed necessary, and if the amendments, judged proper, were communicated to the sister States and their concurrence was requested, was there not the highest probability that everything desirable would be effectually secured? This practicable solution would remove all difficulties from the minds of the members, who found some provision of the Constitution objectionable and would unite the country; and he earnestly recommended the suggestion "to the serious consideration of every gentleman in the honorable convention."

At this, President Hancock arose, observing that he was conscious of the impropriety, as chairman, of his entering into the discussion. Unfortunately, through painful indisposition of body, he had been prevented from attending, but from all he had learned, there appeared to him to be a great dissimilarity of sentiment in the convention. To remove the objections of some, he felt himself induced to hazard a proposition which he would offer in the afternoon.<sup>1</sup>

When afternoon came, Hancock read nine amendments,<sup>2</sup> which had been prepared and put into his hands by Parsons, King and Sedgwick, the Federalist leaders,<sup>3</sup> but Hancock gave the impression that he was their author. The paradox was as complete as the success of the scheme. The Federalist leaders had written amendments similar to those proposed by Whitehill and Findley in the Pennsylvania convention. The Massachusetts amendments declared that the powers not expressly delegated to Congress are reserved to the States. There should be one repre-

<sup>1</sup> Debates, 222-224.

<sup>2</sup> January 31, 1788; Debates, 79-81.

<sup>3</sup> They were in the handwriting of Parsons; Harding, 88.

sentative to every thirty thousand persons until the whole number should amount to two hundred, a number put in by the committee to whom the matter had been referred.<sup>1</sup> Thirteen members of the committee were Federalists, though the intention was to have two delegates from each county, one a Federalist and one an Anti-Federalist. Mayhew and Dunham from Duke's county, were both Federalists, but Dunham did not serve on the committee. During its discussion of the amendments, the opinions of some of its members were changed, so that finally one declined to express any views whatever; fifteen agreed to the report and seven voted against it. This signified that three Anti-Federalists had changed their views.<sup>2</sup>

Congress, so ran this report, should not attempt to regulate elections unless a State neglected or refused to do so; or to make rules subversive of the rights of the people to a free and equal representation. Only when the revenue from imposts and excises was insufficient should Congress lay direct taxes. No company with exclusive commercial advantages should be created. Indictment by a grand jury should precede all criminal trials, except in military, or naval, cases. In suits arising between citizens of different States, the federal courts should have no jurisdiction, unless the matter in dispute was of the value of three thousand dollars; in all federal suits, trial by jury should be allowed at the request of either party. No person holding an office of trust or profit under the United States, should be permitted to accept any title from any foreign power.

Samuel Adams was too astute a politician to reject a

<sup>1</sup> Debates, 82; their report, February 4, Id., 83-85. The committee as appointed consisted of twenty-five members, two from each county, James Bowdoin, chairman.

<sup>2</sup> Debates, 250.

compromise of this kind and urged the adoption of the amendments. He believed that they fairly expressed public sentiment in the other States.<sup>1</sup> He had little faith that the Constitution, if once adopted, would be amended, therefore the amendments now proposed should be adopted, not, however, as a condition of ratification.<sup>2</sup> The course of Massachusetts would be followed, doubtless, by States that had not yet met. Though Adams's advocacy of the compromise practically insured its success, yet, the leading Anti-Federalists looked upon the amendments only as a device to secure ratification. Pierce, of Berkshire, expressed this doubt, when he said that it seemed very uncertain to him that they would ever become a part of the Constitution.<sup>3</sup> Lusk, also of Berkshire, could see in the amendments no relief from the protection which the Constitution gave to slavery and the slave trade, or the danger of the induction of Roman Catholics and pagans into office; but Isaac Backus, a Baptist clergyman from Plymouth county, replied, that religion is a matter between God and individuals, and that to impose religious tests had ever been the greatest engine of tyranny.<sup>4</sup> As to slavery and the slave trade, the new plan was far better than the old, because, under the Articles, no limitation whatever was put upon the trade. Slavery was growing more and more odious through the world, and he intimated that the Constitution encouraged the hope that it would ultimately cease in America.<sup>5</sup>

John Taylor, of Worcester county, advanced the objec-

<sup>1</sup> To what extent they were utilized by Madison when he drew the first draft of the twelve amendments in 1789, see the notes on Chapters VI, VII, post.

<sup>2</sup> Debates, 226-227.

<sup>3</sup> Debates, 242.

<sup>4</sup> Debates, 251.

<sup>5</sup> Id., 252.



tion that no assurance was given that the amendments would ever become a part of the system, to whom Parsons replied, that, in forming a national Constitution, it was impracticable to particularize individual rights, and the plan under consideration gave Congress no power to infringe on any of them.<sup>1</sup> It was at this point in the debate, that the Anti-Federalists, led by Gilbert Deuch, of Middlesex, moved to adjourn the convention. The proposition was discussed the greater part of the day, but at last rejected by a vote of nearly three to one.<sup>2</sup> This clearly encouraged the Federalists to hasten the termination of the business. The defeat of the motion for adjournment was due to the influence of Samuel Adams. Meanwhile the compromise had won over several votes from the opposition, a change which was explained by one of them, William Symmes, of Andover. He had spoken, he said, against the Constitution early in the session, but now he expressed approval of the amendments, and especially as they were to be a standing instruction to the Massachusetts delegates in Congress, he gave the plan his unreserved assent.<sup>3</sup>

The part which Adams was playing was not wholly of his own choosing. He had found little to admire in the Constitution, at first reading, and saw in the plan, not a federal union of sovereign States, which he desired, but a national government, an objection which he hastened to communicate to Richard Henry Lee.<sup>4</sup> But Adams was a political instrument upon which public sentiment played, and the Federalists thoroughly familiar with his character, had stirred up the mechanics of Boston to assemble

<sup>1</sup> Debates, 265.

<sup>2</sup> 321 to 115; Debates, 266.

<sup>3</sup> Debates, 278; Harding, 89-94.

<sup>4</sup> December 3, 1787, Lee's Lee, II, 130. Harding, 95.

two days before the convention met and draw up resolutions demanding as on the part of the trades-people of the Commonwealth that the Constitution be ratified. Adams was of the people and depended for his influence upon his constant response to the wishes of the laboring classes. The meeting of the Boston mechanics practically silenced his opposition. Almost at the last moment he proposed additional amendments:<sup>1</sup> for the liberty of the press, the right to bear arms, the prohibition of standing armies, the right of petition and the exemption from unreasonable searches and seizures.

This unexpected move threatened to ruin the compromise. It alarmed the Federalists, lest too much might be demanded, and equally alarmed the Anti-Federalists lest a sufficient demand for amendments had not been made. Quickly detecting the peril in which he had placed the compromise, Adams withdrew his amendments, but another member at once proposed them again, and there was nothing left for Adams to do save to help defeat his own propositions.<sup>2</sup> The convention was now ready for the vote and Samuel Stillman, a Baptist clergyman of Boston, to whom, by common consent, the privilege of closing the debate had been given, presented the arguments of both sides in a general review. The numerous and extensive object of the general government, he said, would require a system of biennial elections of Congress. This was sufficiently frequent to prevent perpetuity in office. The powers granted to Congress, though great and extensive, were limited and defined. The people were secure, because all officers were elected, elections were frequent, Congress could have no motive to abuse its powers, every State in the Union was guaranteed a repub-

<sup>1</sup> February 6, 1788; Debates, 86, 266.

<sup>2</sup> Harding, 98.

lican form of government, and every officer in Congress, guilty of malconduct, was liable to impeachment.<sup>1</sup>

Before putting the question, Hancock declared that he gave his assent to the Constitution, in full confidence that the amendments proposed would soon become a part of it; they were in no wise local, but calculated to give security alike to all the States. The vote stood, one hundred and eighty-seven to one hundred and sixty-eight, a majority of nineteen for the Constitution.<sup>2</sup> Among the members voting in the negative were nine of the grand committee, who had given the amendments their final form. Nine delegates were absent, and as they were from Anti-Federalist towns, their votes, had they been recorded, would probably have been against the Constitution. Forty-six towns had not sent delegates, and enough of these were Anti-Federalist to have caused the rejection of the plan, had they been represented.

The distribution of the vote confirms the analysis already made of public sentiment in the State. The four coast counties, Barnstable, Plymouth, Suffolk and Essex, cast one hundred yeas and nineteen nays for the Constitution. The five counties to the west, Middlesex, Bristol, Hampshire, Worcester and Berkshire, cast sixty-six yeas and one hundred and twenty-eight nays. The Maine delegates, from Lincoln, York and Cumberland, were almost equally divided; twenty-five yeas to twenty-one nays. Dukes county cast sixty-two votes for the Constitution, and Barnstable was also solidly in its favor; but Worcester county, accessible to the world neither by sea nor river,

<sup>1</sup> Stillman probably meant to say that every officer under the Constitution guilty of malconduct was liable to impeachment. Debates, 266-273.

<sup>2</sup> Debates, 83, 92, 280. For the ratification see Documentary History, III, 90-96.

stood forty-three nays to seven ayes; the banner anti-federal county of the State. The centers of federal support were the counties of Suffolk and Essex.<sup>1</sup> The charge of bribery and corruption made by Anti-Federalist writers against the Massachusetts Federalists in the convention is baseless.<sup>2</sup>

When the vote was recorded, the ratification was formally proclaimed by Joseph Henderson, high sheriff of the county of Suffolk, and the convention adjourned.<sup>3</sup> But this was not the end. The citizens of Boston took up the good news, the bells on the public buildings pealed forth, bonfires were kindled and a concourse of people filled the streets. The artisans and mechanics of the town assembled at Faneuil Hall, where, representing all the trades, and joined by their fellows from adjacent towns, they moved in a grand procession through the streets.

Prominent in the line was the ship *Federal Constitution*, drawn by thirteen horses and manned by thirteen seamen and marines; with full colors flying in the wind; while astern, followed the old ship *Confederation*, hauled up for repairs, but evidently quite beyond restoration.<sup>4</sup> When the plumbers, the cabinet makers, the tinmen and shoemakers, the printers and bookbinders, the tailors, the coach and chaise makers and about thirty other companies in the procession, led by the foresters, and followed by the Republican Volunteers, under Captain Gray, had again reached the Hall, a grand feast was served. A salute of thirteen guns closed the rejoicings. As the procession wended its way through the crooked streets, the printers

<sup>1</sup> For the vote see the Debates, 87-92; for the geographical distribution see Libby, Appendix B, and accompanying map; Harding, 99-100.

<sup>2</sup> Harding, 101-104.

<sup>3</sup> February 7, 1788; Debates, 282.

<sup>4</sup> Debates, 323-329.

struck off songs and ballads, which they scattered among the crowd. On one of these, called "The Raising," was an emblematic design of six pillars supporting arches, and in each arch a star, and on each pillar the name of a State that had ratified the Constitution. The seventh pillar, representing New Hampshire, was reclining near the ground, but above it were the prophetic words, "It will yet rise."

Most of the Anti-Federalists in the State received the ratification as final. The policy of conciliation which the Federalists had inaugurated worked admirably. Acquiescence was so general that the efforts of a few radicals to stir up strife failed. But the Anti-Federal strength in the House of Representatives was sufficient to defeat a resolution of the Senate to print the address for the people, which the Convention had prepared in order to win favor for the ratification. The effect of the vote of Massachusetts was felt throughout the Union. Had the Constitution failed there, it might never have been adopted as the supreme law of the land. Ratification by Massachusetts was the turning of the tide. The State was the first formally to propose amendments, and Jefferson, who, like Samuel Adams, had at first disapproved the Constitution, now changed his opinions and advocated the Massachusetts mode of ratification as the only rational one.<sup>1</sup>

In Maryland, the people of Harford and Anne Arundel counties, and of Baltimore county, outside of the city, were anti-federal in sentiment, but in Baltimore and Annapolis and the remaining portions of the State, public opinion was quite unanimously federal.<sup>2</sup> The Maryland delegates to the Federal Convention, were called before the assembly in November, 1787, to give an account of

<sup>1</sup> Elliot, V, 573; Note, page 213, post; Harding, 105-116.

<sup>2</sup> Libby, 85-86.

the proceedings in which they had been engaged, and Luther Martin, taking great liberty with his oath of secrecy, if not violating it, occupied the attention of the House for three days, in giving an account of the proceedings at Philadelphia.<sup>1</sup> His speech was a fierce assault on the whole plan. His colleague, James McHenry, gave a brief report of his services and was favorable to the Constitution. There was no opposition to calling a convention, and it was ordered that one should meet on the twenty-first of April.<sup>2</sup> Martin, McHenry and John Francis Mercer, who had represented the State in the Federal Convention, were among the delegates chosen.

The personal influence of Washington extended into Maryland as did also that of Richard Henry Lee and Patrick Henry. Washington and Madison labored as assiduously to secure ratification in Maryland as in Virginia, and Lee worked with equal zeal to prevent it. The Anti-Federalists sought to postpone the convention, but this evil was easily prevented. The friends of the Constitution well knew that no time was to be lost, as the action of Maryland would have great influence in the

<sup>1</sup> The speech is known as Martin's Genuine Information and may be found in Elliot, I, 344-389. It was published more or less widely by the Anti-Federalists and though strongly partisan throws much light upon its subject. Perhaps no detail is more clearly brought out than the solicitous care which the Federal Convention took to preserve the secrecy of its proceedings.

<sup>2</sup> The Journal of the Convention, April 21-28, 1788, is reprinted Documentary History, III, 97-122. It consisted of seventy-six delegates of whom seventy-four attended; among them were George Plater of St. Mary's county, chosen president; Samuel Chase of Anne Arundel county; Alexander C. Hansen of Annapolis; William Paca of Harford county. A fragmentary account of the proceedings of the convention is given in Elliot, II, 547-556. The adoption of the Constitution by Maryland is the subject of several critical papers, by Bernard C. Steiner, beginning in the American Historical Review, October, 1899.

States yet to ratify. The almost unanimous opinion of the people of the State in favor of the new plan foreclosed debate so that when the convention met it had little more to do than to register the popular will. There was nothing in the proposed plan inimical to the welfare of Maryland. It had borne a conspicuous part in the movement toward a better national government, and the invitation to the States to assemble at Philadelphia had gone out from Annapolis.

The Constitution was read twice, after which it was debated. As in Pennsylvania so in Maryland the opponents of the plan demanded amendments, and William Paca, of Harford, submitted a list on the twenty-fourth. They were intended to remove the objections which Samuel Chase, the leader of the Anti-Federalists, had pointed out. But objections and amendments counted for little with the majority of the members, who, representing eleven federal counties<sup>1</sup> and the cities of Baltimore and Annapolis, informed the House on the twenty-fifth, that they had been elected and instructed by the people whom they represented to ratify the Constitution as speedily as possible and to do no other act. Having ratified it, their power would cease, and they did not consider themselves authorized to take up any amendments. Paca was not permitted even to read his amendments, but the Anti-Federalists, notwithstanding, continued their objections, and repeatedly called on the Federalists to answer them.

These objections were the familiar ones, that Congress should exert powers expressly delegated; that the Constitution should provide for trial by jury; that the

<sup>1</sup> Frederick, Talbot, Charles, Kent, Somerset, Prince George, Worcester, Queen Anne, Dorchester, Calvert and Caroline. Elliot, II, 548. Forty-five members, Documentary History, III, 101-102.

jurisdiction of the Federal courts should be limited; that provision should be made against unwarrantable searches and seizures, against quartering troops in time of peace in private houses without the consent of the owner; that the freedom of the press should be preserved inviolable, and that the militia should not be subject to national law, except in time of war, rebellion or invasion. Conscious of their strength and satisfied with the new plan as it stood, the Federalists remained inflexibly silent. They called for the vote on the twenty-sixth, and the Constitution was ratified. The vote stood sixty-three to eleven.<sup>1</sup> Among those voting against the Constitution were Martin and Mercer; McHenry voted for ratification.

But the Anti-Federalists were not satisfied, and Paca again laid his propositions before the House. He had voted for the Constitution in full confidence that the amendments would be peaceably obtained. If they were not granted, he declared that the people of Harford county and he himself would oppose the new government. As the Federalists had now carried their point, and the Constitution was ratified, they were more favorable to amendments, and it was almost unanimously agreed that they should be referred to a special committee of thirteen,<sup>2</sup> of which Paca was made chairman. As a result, thirteen amendments were agreed to by the committee, quite unanimously, but fifteen others were rejected. The rejected articles were dear to the minority, who straightway set the committee into a wrangle, with the result that it made no report whatever. By a vote of nearly two to one, the convention then adjourned without formal action on the

<sup>1</sup> Documentary History, III, 105.

<sup>2</sup> As the leading Anti-Federalists in the convention, William Paca, Samuel Chase and John Francis Mercer, belonged to this committee it is probable that they were the authors of the amendments.



amendments.<sup>1</sup> The Maryland convention was, therefore, in some respects quite like that of Pennsylvania; the amendments of the minority in both States failing to pass. But these represented anti-federal sentiment in the State and more or less in other States, and later had weight with Madison's committee in Congress, when it made its report recommending the adoption of twelve amendments.<sup>2</sup>

The rejoicings in Baltimore over the ratification were a repetition of those which Boston had witnessed. The artisans and tradesmen organized a procession, and the day closed with a public dinner, a ball and the illumination of the city. The most conspicuous object in the procession, as at Boston, was the ship *Federalist*, which, completely rigged and manned by marines in their holiday attire, represented to the people the new Ship of State, and the new voyage which they were undertaking. Of all the emblematic objects which might have been seen in the processions that usually followed a ratification, this little ship *Federalist* was undoubtedly the most beautiful to the eye. After the rejoicings were over, it was sent, under command of Captain Barney, to Mount Vernon as a present to Washington, who, in accepting it, remarked on the exactitude of its proportions, the neatness of its workmanship and the elegance of its decorations.<sup>3</sup>

In South Carolina, the strength of the opposition was chiefly among the people in the rural districts, most of whom favored legal tender acts, installment laws and paper money.<sup>4</sup> The insistence of the South Carolina dele-

<sup>1</sup> For all the amendments see Elliot, II, 549-553.

<sup>2</sup> The extent to which the Maryland amendments were incorporated in Madison's report may be seen from the notes to the chapters on the first twelve amendments, Book III, Ch. VI, VII.

<sup>3</sup> Washington to William Smith and others. June 8, 1788. Works, IX, 375.

<sup>4</sup> Libby, 68.

gates in the Federal Convention that the new plan should protect slavery and not bear hard on imports by making discriminating tariff laws, undoubtedly re-echoed the fears of many people in the State. It was divided then, as now, into two regions, known as the upper and the lower division,<sup>1</sup> the highlands and the lowlands. But the opinions of their inhabitants were not so opposite as those of the like divisions in Virginia. The first serious attention given to the new Constitution was in the House of Representatives, which, on the sixteenth of January, 1788, in Committee of the Whole, listened to Charles Pinckney's account of the origin and development of the new plan.<sup>2</sup> The necessity of having a government which would operate upon the people and not upon the States, he said, was conceived to be indispensable by every delegation present at Philadelphia. A system of checks and balances had been incorporated in the plan which would secure the preservation of all rights, public and private. A federal judiciary was necessary to control and to keep the State judiciary within proper limits. No danger was to be apprehended from the executive power, because it was dependent upon the legislative and was guarded by many limitations.

Pinckney agreed with Wilson and McKean that the new government promised to be the best ever offered to the world. Instead of being alarmed at its consequences, the people might well be astonished that one so perfect had been formed from so discordant and unpromising materials. The system was conceived on republican principles and properly distributed powers of government. But the opposition did not take so favorable a view.

Rawlins Lowndes, whose patriotism had been doubted

<sup>1</sup> For the importance of this division in 1868, at the time of the adoption of the fourteenth amendment, see Vol. III.

<sup>2</sup> Elliot, IV, 253.

in 1776,<sup>1</sup> could see only danger in placing the treaty-making power in the Senate, a quorum of which could consist of fourteen, and the number necessary to negotiate a treaty only ten. The plan discriminated against the South, so that it was not probable that either South Carolina or Georgia would ever furnish a President. Charles Cotesworth Pinckney replied,<sup>2</sup> that this mode of reasoning was unfair. South Carolina would have its share in the appointment of the President, and in the election of Senators; so, too, would Georgia; and if either State had a man fit for the Presidency, the fact that he was from the South would not be an objection.<sup>3</sup> Rutledge<sup>4</sup> corrected the interpretation of the treaty-making power, which Lowndes had made, and scouted the idea that only ten members would ever be left to manage the business of the Senate. A treaty under the Articles of Confederation was no less paramount to local law than one would be under the Constitution,<sup>5</sup> and David Ramsey observed that the country would soon find itself without ambassadors if it did not intend to fulfill treaties after they were made.

But Lowndes insisted that the country was already under the government of a most excellent Constitution, which had stood the test of time and carried it through difficulties generally supposed to be unsurmountable, giving it at last the blessings of liberty and independence; why then be so impatient to change it for another, and to pull down a fabric which had been raised at the ex-

<sup>1</sup> Id., 265.

<sup>2</sup> Id., 267.

<sup>3</sup> The people of Georgia and the Carolinas at this time seemed to have identified Maryland and Virginia with the North rather than with the South.

<sup>4</sup> Elliot, IV, 268.

<sup>5</sup> Charles C. Pinckney, January 17, 1788. Id., 277-278.

pense of so much blood. He believed that when the new Constitution should be adopted, the sun of the southern States would set never to rise again. By the new plan, the eastern States would form a majority in the House of Representatives; what safety did this augur for the South? Jealousy of the slave trade and its limitation to twenty years, or, for that matter, any limitation at all, were without cause, and he spoke words destined to be echoed and re-echoed for seventy years,<sup>1</sup> that the trade was justifiable on the principles of religion and humanity, for it transported human beings from a bad country to a good one. The North did not like slavery, because it had no slaves, and, therefore, wished to exclude the South from its great advantage.<sup>2</sup> At this time North Carolina, South Carolina and Georgia, as Pendleton observed, permitted the importation of slaves, but he might have added that the constitution of Delaware forbade it.<sup>3</sup> Lowndes defended the trade, asserting that, without her negroes, South Carolina would degenerate into one of the most contemptible States in the Union; and he strenuously objected to the taxation of ten dollars which might be levied on each negro imported. Negroes, he said, were the wealth and natural resource of the State, but the North was determined to tie up the hands of its people and strip them of what they had.<sup>4</sup>

<sup>1</sup> For an account of the proposed re-opening of the African slave trade in 1860, see post; Vol. III, index.

<sup>2</sup> Elliot, IV, 272, see the Declaration of Causes and the Appeal of the slave-holding States issued by South Carolina in 1860. Post pp. 561-581.

<sup>3</sup> 1776, Article XXVI. This was the only explicit prohibition in any State constitution. It will be remembered that during the debate on the slave trade in the Federal Convention, it was suggested that Georgia and the Carolinas be prohibited by name in the Constitution from engaging in it.

<sup>4</sup> Elliot, IV, 273.

Pinckney, in reply, explained that the Convention had found it necessary to give extensive powers to the federal government, over both the persons and the estates of citizens, and, therefore, had thought it right to draw one branch of the legislature immediately from the people, wealth and numbers both being considered in the representation. The best rule for ascertaining wealth, it had been thought, was the productive labor of the inhabitants, and in conformity with this rule and a spirit of concession, three-fifths of the slaves had been added to the whole number of free persons. The first House of Representatives would consist of sixty-five members, of whom South Carolina would send five. This was one-thirteenth of the entire number, and the same proportion that the State had in the Confederation.

At this time it was generally believed that population was likely to increase most rapidly southward and southwestward, as the movement of population was in that direction.<sup>1</sup> The prospect, therefore, that the southern States would have an adequate share in representation was encouraging. As yet the South was weak. South Carolina without union with the other States must decay. Lowndes's objections to the restrictions on the slave trade after the year 1808, led Pinckney to explain that the southern delegates, in settling the slave trade, had to contend with the reasons and political prejudices of the eastern and middle States and with the interested and inconsistent opinions of Virginia, which was warmly opposed to the further importation of slaves. Pinckney reasserted his belief that slave labor was essential to the prosperity of South Carolina. He did not hold with the opponents

<sup>1</sup> For an account of the lines of migration to the West and a map showing the wilderness roads, see my *Constitutional History of the American People, 1776-1850*, I, 157-158.

of unlimited importation, that slaves increased the weakness of the State admitting them, or that they were a dangerous specie of property in time of war. The middle States and Virginia had demanded immediate and total prohibition, and the southern delegates had secured what they could, unlimited importation for twenty years.<sup>1</sup> The compromise was the more impressive, because it was the work of a special committee. The clause limiting free importation after twenty years did not declare that importation should then be stopped; it might be continued. The South was secure; the general government could never emancipate the negroes, for no such power was given to it,<sup>2</sup> as it was admitted that it had only the powers expressly given it by the several States.<sup>3</sup> The South had secured the right to recover its slaves in whatever part of the Union they might take refuge, a right it had not possessed before. Considering all the circumstances, the southern delegates had made the best terms possible for the security of slave property. They would have made a better bargain had they been able, but on the whole the one made was not bad.<sup>4</sup>

Lowndes was not convinced, however, and repeated his argument that the eastern States had the best of the bargain; for, as the carrying trade was in their hands, they could compel the payment of exorbitant freight charges. He did not believe that the eastern States possessed ships enough to carry all the produce of the South. Paper money, too, was prohibited, though it was popular with many, and he demanded to know what evils had the State

<sup>1</sup> Id., 282, 283, 285.

<sup>2</sup> This argument runs on through the speeches made in 1865, by the opponents of emancipation. See Vol. III.

<sup>3</sup> This idea was incorporated by several States, in a proposed amendment, and by South Carolina, among them.

<sup>4</sup> Elliot, IV, 286.

ever experienced by using a little paper money as a relief from pressing emergencies. Formerly the State had issued paper bills annually and recalled them every five years, to the great convenience and advantage of its people. Paper money had carried the country triumphantly through the war and fully established its independence; but, now a stop was to be put upon paper issues, however great the public distress might be. The absence of a Bill of Rights, too, was another serious defect in the new plan. After pronouncing a glowing eulogy on the old Confederation, he advised, as Randolph had done, that a new federal convention be called.<sup>1</sup> This praise of the old Articles caused Jacob Read to remark, that the boasted efficiency of Congress was farcical.<sup>2</sup> John Mathews, the Chancellor of the State, observed that had the Confederation been in force in 1776, the country would inevitably have been lost, because Congress, under the Articles, had no power to give Washington adequate authority, and he denied the accuracy of Lowndes's statement, that the carrying capacity of northern ships was insufficient to meet the demands of the South.<sup>3</sup>

The eulogy of the Confederation brought out another speech from Pinckney, which ranks with his celebrated speech in the Federal Convention. He agreed with the Chancellor that independence had been won, not because of the Confederation, but owing to the vast abilities of Washington, the enthusiasm of the people and the assistance of France. The United States were independent before the treaty with Great Britain, in 1783, which was not a grant, but the acknowledgment of a fact.<sup>4</sup> Independ-

<sup>1</sup> Id., 289-290.

<sup>2</sup> Id., 286.

<sup>3</sup> Id., 298.

<sup>4</sup> Compare this statement and the ones following with President Lincoln's opinion of the origin of the Union, post; Vol. III, pp. 4-9.

ence dated back to that old charter made in Congress on the fourth of July, 1776, in which the several States were not even enumerated. The separate independence and individual sovereignty of the States, said he, were never thought of by the enlightened patriots who framed the declaration. Freedom and independence had arisen from the union, without which they would have been impossible. All attempts to weaken the Union by maintaining that each State was separately and individually independent should be considered a species of political heresy which could produce no benefit, but which might bring most serious distresses upon the country.

His answer to Lowndes was comprehensive and complete. The general good of the Union required that all the powers which the Constitution specified ought to be vested where it had placed them, and Pinckney fell back on Wilson's argument in Pennsylvania, that as all the powers granted sprang from the people and were to be exercised by persons frequently chosen mediately or immediately by them, and that as the people in each State had a share in the government in proportion to their importance, there was no danger of the abuse of these powers, so long as the people remained incorrupt, and corruption was more effectually guarded against in the proposed government than in any that had ever been formed.<sup>1</sup> Applying his principles in detail, he showed that every grant of power was made secure by adequate limitations, and that no part of the plan was beyond the ultimate control of the people. Answering Lowndes's question, what harm paper money had done, he replied that it had corrupted the morals of the people; had diverted them from paths of industry to ways of ruinous speculation; had destroyed

<sup>1</sup> Id., 300-302.



credit, both public and private, and had brought total ruin on numberless widows and orphans.<sup>1</sup>

That the new government would be aristocratic, and that by its omission of a Bill of Rights it would injure the liberties of the people, were claimed by James Lincoln, *if Ninety-Six*.<sup>2</sup> Pinckney replying to these and to other objections, showed that the President's term of office, his re-eligibility, and his powers and the manner of choosing him, had been fully discussed in the Convention and were the result of common approval. Nor had its members forgotten to consider a Bill of Rights, but had concluded that none was needed, because the general government having no powers, save those expressly granted to it, could not take away the rights of the people.<sup>3</sup> But another reason had had weight, particularly with the South Carolina members, against the insertion of a Bill of Rights. These generally began with the declaration that all men by nature are born free, but the South Carolina delegates would have made that declaration with very bad grace, while a large part of their property consisted in men, who were actually born slaves.<sup>4</sup>

The question being put, whether a convention should be called to consider the Constitution, it was carried unanimously.<sup>5</sup> On the following day the question being whether the convention should assemble on the twelfth of May, at Charlestown, it was carried by a majority of only one,<sup>6</sup> the minority favoring Columbia. The number of dele-

<sup>1</sup> *Id.*, 306.

<sup>2</sup> *Id.*, 313-315.

<sup>3</sup> Compare with Hamilton's explanation of the omission of a Bill of Rights in the *Federalist*, No. LXXXII, also Nos. XLIX, L, LI.

<sup>4</sup> *Elliot*, IV, 315-316.

<sup>5</sup> January 18, 1788. *Id.*, 316.

<sup>6</sup> 76 to 75; *Id.*, 317.

gates chosen were two hundred and thirty-six. Those from the country districts were generally instructed to oppose the Constitution, though it does not appear that all the anti-federal districts gave this specific direction.<sup>1</sup>

A convention so numerous was bound to include the most prominent men in the State. Many of the delegates were greatly distinguished; Charles C. Pinckney, Charles Pinckney and John Rutledge, who had been delegates of the State to the Philadelphia Convention were among the number. There were other members scarcely less famed, among whom were Thomas Pinckney, the Governor, who, eight years later, was the candidate of the Federalists for Vice-President; Christopher Gadsden, venerable in years and doubtless the most highly esteemed man in the Commonwealth; David Ramsey, the historian; Edward Rutledge, at one time the Governor of the State, and one of the signers of the Declaration of Independence; Thomas Heyward, also a signer, and with him Henry Lawrence, John Mathews and Richard Hutson, also signers of the Articles of Confederation. The names of Francis Marion, William Washington and William Moultrie, suggested how near was the convention to the stirring incidents of the late war. Among the leading Anti-Federalists were General Sumter and Edanus Burke. No convention which assembled to ratify the Constitution surpassed this of South Carolina in ability.

On the thirteenth of May, a majority of the delegates having assembled, Thomas Pinckney, the Governor, was elected president, and the discussion of the Constitution began. As in the late session of the legislature, the Constitution was now most ably defended by the delegates of

<sup>1</sup> Libby, 93-94.

the State to the Federal Convention. As in Massachusetts, the instrument was taken up paragraph by paragraph. The victory had already been won in the legislature, but the Anti-Federalists, convinced that they could not defeat the Constitution, resolved on a policy of delay. Charles Pinckney, on the fourteenth of May, made a defense of the new government, basing his argument on the protection which it would afford to all classes of men and to all the interests of the Union. He emphasized the fact that it was based largely on the State constitutions and existing laws. Even the Senate, which had been so bitterly attacked by Lowndes in the legislature, was not unlike the analogous branch in most of the States. He called attention to the system of checks and balances which permeated the plan, but rested his defense chiefly on two truths, that the new Constitution was founded on the State systems and was within the control of the people.<sup>1</sup>

Tweed, a delegate from Prince Frederick, did not omit the familiar caution that the new plan should not be hastily adopted. He leaned to the opinion that another general convention was desirable. Pinckney at least convinced the Federalists, that the limitations which the Constitution imposed upon the States were salutary and necessary, and particularly the prohibition of paper money; for experience had shown that in every State in which it had been emitted since the Revolution, it always forced gold and silver out of the country and discouraged commerce. Every medium of trade, he argued, should have an intrinsic value, which paper money lacks; therefore, gold and silver were the fittest medium. The debtor class, through their representatives in the assemblies, would whenever possible, make paper money with fraud-

<sup>1</sup> Elliot, IV, 318-332. It will be observed that Pinckney's argument is the same as that used by the authors of the Federalist.

ulent views. In the States in which the credit of paper had been best supported, the bills had never been kept at par in circulation. Trade, if untrammelled, would doubtless command a sufficient sum in specie for its own purposes. So long as State issues were permissible, the citizens of South Carolina would be unable to trade with those of other States and be sure of receiving the value of their commodities. But, above all, the prohibition of State issues was needed to restore our foreign credit. Under the Constitution, there would be no more paper money, or tender laws, to drive commerce from our shores or cast a shadow on the American name.<sup>1</sup>

In accordance with their policy of obstruction and delay the Anti-Federalists, led by General Sumter, moved an adjournment until the twentieth of October, by which time the remaining States, and especially Virginia, would have acted; but this was defeated.<sup>2</sup> On the twenty-third, the Constitution was ratified by a vote of one hundred and forty-nine to seventy-three.<sup>3</sup> The Anti-Federalists succeeded in securing four amendments, namely, the right of prescribing the manner, time and place of holding elections to the Federal Legislature should be forever inseparably annexed to the sovereignty of the several States; the States should retain every power not expressly relinquished by them and vested in the general government;

<sup>1</sup> May 20, 1788, *Id.*, 333-336.

<sup>2</sup> May 21, 1788, 135 nays, 89 yeas.

<sup>3</sup> *Id.*, 338-340. Most of the negative votes came from the district eastward of the Wateree, nine from the district of Ninety-six; 8 from Saxe; from Gothe 6; the Lower districts between the Broad and Saluda Rivers 5; the Spartan district 5; the district between the Broad and Catawba Rivers, Richland county 3; Fairfield county 4; Chester district 4; the district called the New Acquisition 10. The authorship of the amendments is unknown, it is not improbable that Edanus Burke had much to do with it. For the ratification see Documentary History, III, 123-140.

Congress should never impose direct taxes, save when the revenue arising from the indirect was insufficient, and not then until requisition had been made upon the States; and the language of the Constitution prohibiting religious tests should be modified, so as to read that no other religious test should be required as a qualification to office under the United States than the oath or affirmation to support the Constitution.<sup>1</sup> The second and third amendments were among those which Massachusetts had recommended.<sup>2</sup>

Four days after the ratification, the event was celebrated in Charleston as it had been in Boston and Baltimore by a procession of the trades. The ship *Federalist*, full rigged and manned, was the chief piece in the parade, as it had been in those towns. A packet swiftly sailing from Baltimore had brought to Charleston the news of ratification by Maryland, and now it carried back like news from South Carolina, and arrived in Baltimore on the last day of May. The joyous intelligence was received with a federal salute, was spread through Virginia and was carried on to Philadelphia and New York. Within a week it had reached New Hampshire. It was everywhere received by the Federalists as a sure sign that the Constitution would soon be approved by the requisite number of States.

The Constitution had now been before the country eight months and eight States had ratified; the ninth might be New Hampshire, New York or Virginia. The figure of the New Hampshire column partly raised to the Federal arch, lately displayed in the Massachusetts papers, illustrated the condition of affairs in New Hampshire. Thus

<sup>1</sup> Compare Article VI, Section 3.

<sup>2</sup> For the amendments see Documentary History, III, 139-140; Elliot, I, 325.

far, ratification had proceeded with remarkable smoothness in the States which had convened, but in New Hampshire the new plan had met with its first check. The inhabitants of that State at this time numbered about one hundred and thirty-four thousand, and most of them were engaged in farming. Not a city within the State contained a population of eight thousand. If local government be tested by the intelligent interest which a people take in it, it was of a high order in New Hampshire. Its town-meetings were well attended. The civil system of the State was like that of Massachusetts, and the similarity between the constitutions of the two States<sup>1</sup> was even closer than that between the constitutions of Pennsylvania and Vermont.<sup>2</sup> The very perfection of the New England type of local government militated against the new plan, for the town-meetings gave opportunity for endless debate and local independence.

When the New Hampshire convention met at Exeter on the thirteenth of February, 1788, it was found that one hundred and thirteen delegates had been returned from one hundred and seventy-five constituencies.<sup>3</sup> Among them were John Langdon, of Portsmouth, one of the delegates of the State to the Federal Convention; Benjamin West, of Charlestown, who had been commissioned with him, but who had not attended; General John Sullivan of Dunham, the Governor; Samuel Livermore of Holderness, Chief Justice of the Superior Court, and John Tay-

<sup>1</sup> Massachusetts, 1780; New Hampshire, 1784.

<sup>2</sup> Pennsylvania, 1776; Vermont, 1777. The Pennsylvania sources of the Vermont constitution are shown in *The Constitution of the State of Vermont, etc.*, Brattleboro; C. H. Davenport & Co., 1891, pp. 40-44; for an account of these constitutions see my *Constitutional History of the American People, 1776-1850*, I, Chapter IV.

<sup>3</sup> Walker's *New Hampshire Convention*, 8.

lor Gilman of Exeter, who had served in the old Congress, and later was four times governor of the State. These were the leading Federalists. Equally earnest in their opposition to the new plan were Joshua Atherton, of Amherst, a graduate of Harvard, and in the early days of the Revolution, sufficiently loyal to the Crown to occasion his imprisonment in the Amherst jail; Charles Barrett, of New Ipswich, a fellow loyalist, but soon, like Atherton, regaining the confidence of his fellow citizens; William Hooper, a Baptist clergyman of Madbury, and Mathias Stone, of Claremont. From Saulsbury came Ebenezer Webster,<sup>1</sup> chiefly distinguished as the father of the Exponenter of the Constitution. The Federalists were in a hopeless minority, but their overconfidence led them to expect ratification.

On the fourteenth of February, the convention was fully organized, with John Sullivan as President. It was soon clear to the Federalists that their hopes of ratification were without foundation, but they continued the discussion of the Constitution for seven days.<sup>2</sup> The debate had the good effect of informing most of the delegates of the true character of the Constitution, and of changing the opinions of a sufficient number so as materially to diminish the anti-federal majority. But to press a vote meant the defeat of the Constitution, and as most of the delegates had come up with instructions, they found themselves in the dilemma of voting against their instructions or their judgment; therefore the friends of the Constitution suggested a recess till the delegates could again consult their constituents; this would give opportunity for a campaign of information, and this the Federalists accordingly

<sup>1</sup> His services in the convention were inconspicuous. There is some evidence that he opposed the Constitution.

<sup>2</sup> Walker, 25-27.

adopted at Langdon's suggestion.<sup>1</sup> Atherton and the anti-federal leaders earnestly opposed this, but without success; Langdon's resolution was finally carried by a majority of five votes, and the convention was adjourned to meet at Concord on the eighteenth of June.

The friends of the Constitution hailed this result as a great victory and straightway began a campaign of information. The people of the State should be told the true character of the proposed government. The Anti-Federalists also claimed the adjournment as a victory, and were confident that it would be so construed in other States; at least, it would give ratification a serious check. Some near the seat of action interpreted the condition of affairs more accurately: the *Massachusetts Centinel* had caught the spirit of public sentiment in New Hampshire, when it represented the New Hampshire column half way risen to the federal arch.<sup>2</sup>

Meanwhile Maryland and South Carolina had ratified and the news from South Carolina reached New Hampshire in the first days of June. When, then, the convention reassembled, on the eighteenth, and it was known that Virginia<sup>3</sup> and New York were also in session, the effect of the activity of the Federalists since February was apparent.

The adjourned session attracted far greater attention in the State than had the session at Exeter. The weight of ability was distinctly on the side of the Federalists. They profited by the sagacity of Rufus King and the Massachusetts Federalists, and on the twentieth of June, through Langdon, moved the adoption of twelve amend-

<sup>1</sup> Id., 29.

<sup>2</sup> Id., 43.

<sup>3</sup> The Virginia convention met June 6, and the New York June 17.



ments, similar to those which had been adopted in Massachusetts.<sup>1</sup> The similarity between them leads to the conclusion that the objections made to the Constitution in the two States were the same.<sup>2</sup> Sullivan quickly added that the Constitution should be ratified with the amendments, but should not go into effect without them; but this condition meant the practical defeat of the plan. The debate then began. The acceptance of the amendments would settle the main question and Atherton, detecting how things were going, did as the Anti-Federalists had done in every Convention thus far assembled; he moved an adjournment to some future day; but this was defeated. Langdon then called for the vote; it was taken and the Constitution was ratified by a vote of fifty-seven to forty-seven, with four members absent.<sup>3</sup> The distribution of this vote shows that the northern and southwestern portions of the States were against the Constitution, and the southeastern portion for it.<sup>4</sup> This

<sup>1</sup> *Id.*, 40; the amendments are given in Walker's, 49-51; Elliot, I, 326; and in Documentary History, III, 142-143. The extent to which they were incorporated in the Constitution is shown in the chapters on the first twelve amendments, post. Vol. III.

<sup>2</sup> The debates in the New Hampshire Convention are not preserved, a fragment however is given in Elliot, II, 203; a speech of Joshua Atherton against the continuation of the slave trade; Walker, 112-114, and another in support of the Federal Judiciary by General Sullivan; Walker, 115-116.

<sup>3</sup> For the ratification see Documentary History III, 141. Among the absentees was Ebenezer Webster; it does not appear that his part in the convention was at all conspicuous.

<sup>4</sup> On the instructions to the New Hampshire delegates see Libby, 70-75; and address by Hon. A. S. Batchellor, entitled "A Brief View of the Influence which Moved in the Adoption of the Federal Constitution by the State of New Hampshire," delivered before the Grafton and Cos. Bar Association at Berlin, January 27, 1899; printed in the Littleton Courier, February 1, 1899. I am under many obligations to Mr. Batchellor for New Hampshire data used in the present volumes. See also Walker, 45-47.

federal region was the oldest part of the State; was in proximity to the sea, and was interested in commerce. The southwestern and northern sections were remote from the lines of travel, were interested almost solely in agriculture, and did not feel the need of a new government. The fifty-seven delegates, who voted for ratification represented nearly the same percentage of the population of the State.<sup>1</sup>

New Hampshire thus repeated the political paradox of Massachusetts: the Federal party proposing amendments to a plan of government with which they were abundantly satisfied, but the reasons in both commonwealths were the same. The amendments were the price of ratification; Langdon's were in substance a transcript of the Massachusetts set, and were twelve in number. While their authorship is uncertain, there is little doubt that they were principally the work of Langdon and Judge Livermore.

The vote was taken on Saturday, the twenty-first of June, at one o'clock in the afternoon. Langdon at once sent the news to Governor Hancock, of Massachusetts, and, a little later, to Rufus King and Alexander Hamilton. The vote had been anticipated, and Sullivan and Knox had arranged that special express riders should bear the news to Poughkeepsie,<sup>2</sup> where the New York Convention was in session, and to Richmond, where the Virginia delegates had just met. The news was of the greatest importance, for New Hampshire was the ninth State to ratify, and the Constitution could now be put in force. When the news reached Portsmouth, on Sunday morning, even the habits of Puritan propriety were

<sup>1</sup> The 57 yeas represented 76,091 people; the 47 nays represented 57,641. Walker, 47.

<sup>2</sup> See p. 144.

not stern enough wholly to restrain the people from expressions of joy. The second day of the week began with the ringing of bells and the pealing of salutes. Thursday was appointed as the day to celebrate, and the people at an early hour began pouring into the town.

About eleven o'clock, a watchman from the State House gave notice that he descried an armed ship bearing down under full sail. On being hailed, it proved to be the ship *Union*, out five days from Concord, bound to the Federal City. She dropped anchor, and having taken a pilot on board soon got under way and joined the procession, which was like that which had already been seen in the streets of Boston, Baltimore and Charlestown. The favorite emblem of the hour was of nine strong pillars supporting Federal arches. The ninth was New Hampshire, and the tenth, partly raised, was Virginia. Scarcely less imposing were the celebrations at Salem, Providence and Newport.<sup>1</sup> The people of New Hampshire were fully compensated for the check on the course of ratification, which the adjournment of their convention had caused. It gave them the unique honor of being the ninth State to ratify, and of completing the number required by the Constitution to inaugurate the new government. Meanwhile the people of Virginia had been discussing the Constitution.

<sup>1</sup> Walker, 54-64.

## CHAPTER III.

### RATIFICATION BY VIRGINIA.

The adjournment of the New Hampshire convention, Washington recognized as prudent, but as very *mal a propos* for Virginia, which at this time and for thirty years afterwards ranked first in the country in population, wealth and political influence.<sup>1</sup> The news reached the State while the elections to the convention were going on, and gave an opportunity to the opponents of the Constitution to represent to the people that it had not been so generally approved in other States as they had been taught to believe; therefore, it tended to influence their votes in favor of anti-federal candidates.<sup>2</sup> For months Washington had been ceaselessly active on behalf of the new plan. On his return from the Federal Convention he had sent copies of the Constitution to Thomas Nelson, Benjamin Harrison and Patrick Henry, former Governors of Virginia, urging their influence in its behalf. He wished it had been more perfect, but believed it the best that could be obtained at this time. Its adoption was eminently desirable under the existing circumstances of the Union, and a door was left open for amendments.<sup>3</sup> Henry soon replied that he could not give the Constitution his support, and Harrison plainly intimated that he thought the remedy would prove worse than the disease, but he would withhold his judgment until the general assembly had taken action. He was chiefly concerned

<sup>1</sup> Between 1810 and 1820 it fell back to a second place, being supplanted by New York. In 1890, New York stood first, and Virginia, nineteenth in rank.

<sup>2</sup> Washington to John Langdon, April 3, 1788; Sparks, IX, 340.

<sup>3</sup> Washington to Henry, September 27, 1787; Sparks, IX, 256.

less the unlimited powers of taxation and the regulation of trade would establish a tyranny, and the powers given both the President and Congress would make the States south of the Potomac little more than an appendage to the Union.<sup>1</sup>

The situation in Virginia was unlike that in any other State. In New England the leaders took their political opinions largely from their constituents, and this was true in all States in which the township system of government existed. But in Virginia and southward, where the county system prevailed and the town meeting was unknown, the people in great measure took their opinions from the leaders.

Both Elbridge Gerry and George Mason, who had refused to sign the Constitution, had published their objections, but with very unequal effect. Gerry's fell flat in Massachusetts, for the people there, long accustomed to the discussion of public questions in town-meeting, considered his opinions of little more account than any other man's, but in Virginia and farther south Mason's objections were received by many people as of oracular importance; James Iredell, of North Carolina, considered them worthy of particular answer.<sup>2</sup> Governor Randolph, who had also refused to sign, had published a letter<sup>3</sup> giving his reasons, which had been widely circulated through the State. Luther Martin's "Genuine Information" had followed at its heels, and Richard Henry Lee's "Letters of a Federal Farmer" had been circulated broadcast by the Anti-Federalists.

<sup>1</sup> Id., 266-267.

<sup>2</sup> Both Mason's and Iredell's observations are reprinted in Ford's Pamphlet. Iredell wrote under the pseudonym of Marcus.

<sup>3</sup> Addressed to the speaker of the House of Delegates, October 10, 1787, Elliot, I, 482-491.

The limitations of the human voice alone prevented Patrick Henry, who was bitter against the new plan, from reaching every voter in the State. Washington was never busier with his correspondence than during these uncertain days. He was kept accurately informed of the progress of the Constitution in other States and exerted himself to make his approval of the new plan widely known throughout his own. His letters at the time, as during the preceding year, emphasize his conviction that the alternative was the adoption of the Constitution or the total dissolution of the Union.<sup>1</sup>

On the nineteenth of October, the Virginia legislature took up the recommendation of Congress that the Constitution go before State conventions. It was observed that there was a quorum on the first day of the session and that business was immediately taken up, such an occurrence had not been known since the Revolution.<sup>2</sup> By a unanimous vote, six days later, it authorized a convention to meet on the first Monday in June, with full power to discuss the new plan and submit amendments. Patrick Henry, who was a member of the House and was hostile to the plan, saw the hopelessness of opposing it there, and reserved his strength till it could be put forth to greater advantage in the forthcoming convention. His declaration that to decide on the Constitution would transcend the powers of the assembly, and that it must go before a convention, greatly surprised and pleased the Federalists, who had anticipated a different course from this anti-federal leader.<sup>3</sup>

<sup>1</sup> Washington to Patrick Henry, September 24, 1787; to David Stuart, October 17; to Bushrod Washington, November 10, and Daniel Stuart, December 10; in Sparks, IX.

<sup>2</sup> A member of assembly to Washington quoted in Washington's letter to Madison, October 22, 1787; Sparks, IX, 273.

<sup>3</sup> Id., 273.

From the time of the adjournment of the Federal Convention, and during the intervening weeks till the Richmond convention assembled, the friends and opponents of the Constitution exerted themselves to reach every voter in the State. The exact result of the campaign preceding the election was doubtful, even after the delegates had been chosen. Both parties claimed the victory, and even Henry admitted that their strength was about equal.<sup>1</sup> Grayson, who was hardly less opposed to the Constitution than Henry, confessed that anti-federal success in the convention was suspended by a hair.<sup>2</sup>

Testimony gathered from the results of the election and before the convention assembled went to show that public sentiment in the State was wavering and would approve, or disapprove, the Constitution as the leaders might decide. The vote of Virginia depended on them, and they depended on the independent delegates in the convention. Its debates promised, therefore, to be of extraordinary interest. Even Washington, whose powers of weighing probabilities were unsurpassed, declared that it was impossible to say, with any degree of certainty, what the decision of the convention would be. He thought the least opposition was to be expected from the northern part of the State, but was convinced, however, that there would be a greater weight of ability against the Constitution in Virginia than in any other State.<sup>3</sup>

With the exception of Washington, Jefferson and Richard Henry Lee, nearly every eminent citizen in the

<sup>1</sup> *Life of Henry*, II, 342.

<sup>2</sup> *Id.*, 344.

<sup>3</sup> Washington to James Wilson, April 4, 1788; for a particular account of the instructions to the delegates see Libby, 86-92.

State was chosen a delegate. Among the one hundred and seventy members were Madison, Randolph, Blair, Wythe and Mason, who had attended the Federal Convention; Patrick Henry, who had declined an appointment; James Monroe, destined to be the fifth President of the United States; John Marshall, afterward Chief Justice; Bushrod Washington, destined to be his associate, and a long list of distinguished colleagues, including William Grayson; Benjamin Harrison, one of the signers; Humphrey Marshall, and the venerable Edmund Pendleton, Chancellor of the State, who was unanimously chosen President.<sup>1</sup>

The absence of Jefferson was conspicuous. Had he not been serving his country as minister to France, at this time, he undoubtedly would have been serving his State as a member of this convention. His close correspondence with Madison kept him in touch with American affairs and preserved his influence in the convention. His probable course there, had he been present, can only be hypothesized. There is much reason for believing that it would have been opposite to Hamilton's course in the New York Convention. The work of Marshall and Madison would have been more arduous.

It speaks eloquently for the influence of Jefferson, at this time, that to this day a popular tradition lingers that he wrote the Constitution, or at least was foremost in securing its formation and adoption. His diplomatic services have quite vanished from the popular memory. The Federalists have not placed on record any regret that Jefferson was out of the country while the Constitution was in process of formation and while it was in course of rati-

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<sup>1</sup> The debates of the Convention are in Elliot, III; see also the Richmond Edition of 1805; the Journal was republished at Richmond by Thomas W. White, 1827.

fication. Anti-Federal opposition to the new plan embodied all of Jefferson's scruples against its scope and character. Of one thing we are certain, that Jefferson's chief objections were removed when a Bill of Rights had been added, and it was for such a Bill that the Anti-Federalists successfully contended in every State.

The Convention assembled at the State House on the second of June, 1788, but for the greater convenience of so large a body it met, on the third, at the New Academy, where its session continued to the end. A resolution offered by Mason was unanimously approved, that the Constitution should be discussed through all its parts, clause by clause, before the vote should be taken.<sup>1</sup> After the preamble and the first article had been read, the debate was opened by Nicholas with a general defense of this part of the plan. He anticipated the objection to the omission of property qualifications for members of Congress, remarking that most of the electors in Virginia were landed men, and, as they would naturally choose such men to represent them, the landed interest would therefore prevail. Even if the States were divided into districts, the mercantile would not have an equal weight with the landed interest.<sup>2</sup> Men of ability would not be excluded, even though they owned no land, if the controlling interest should choose to elect them.

Washington, in a letter to his nephew, now a member of the convention, had observed that the power in the Constitution would always be in the people; that it was entrusted for certain defined purposes and for certain lim-

<sup>1</sup> Elliot, III, 4.

<sup>2</sup> By the act of the Virginia assembly, November 20, 1788, the State was divided into ten congressional districts, and a representative in Congress was acquired to be a freeholder, and to have resided twelve months in the State.

ited periods to representatives of their own choosing, and that whenever it was exercised contrary to their interest, or not agreeable to their wishes, their servants could, and undoubtedly would, be recalled.<sup>1</sup> It was substantially on this idea that Nicholas based his defense of the new plan.<sup>2</sup> Patrick Henry began further back than Nicholas and attacked the preamble. Who authorized the Convention, he inquired, to speak the language of "we the people" instead of "we the States?" States were the characteristic and soul of the Confederation. If they were not the agents of the new compact it must be one great, consolidated, national government of the people of all the States. But the people had given them no power to use their name; therefore, the Federal Convention had exceeded its authority; it should merely have amended the old system.<sup>3</sup>

Randolph, who had refused to sign the Constitution, and who now declared that were he to return he would again refuse, found himself in a perplexing position. He believed that the political salvation of the country depended upon a more perfect Union, and that the Confederation had utterly failed. He had refused his consent to the plan, because it lacked some provisions which amendments could supply. He expected these would be offered and ultimately adopted, and so earnest was he in his desire to secure the Union that he declared that rather than assent to its dissolution, he would lose his right arm.<sup>4</sup>

Whether the Constitution was good or bad, replied

<sup>1</sup> Washington to Bushrod Washington, November 10, 1787; Sparks, IX, 29.

<sup>2</sup> Elliot, III, 9-20.

<sup>3</sup> Id., 22-23; 44.

<sup>4</sup> Id., 26.

Mason, the proposition under discussion clearly proved that it was a national government and not a Confederation. The assumption of the power to lay direct taxes would entirely change the league of States into a consolidated government, which would subvert every principle which had hitherto prevailed in the country. It would totally annihilate the State governments. Two concurrent powers, each levying taxes, could not exist without the one destroying the other. The general government would be paramount to that of the States. Not a single example, he said, on the face of the earth, supported the opinion that a national government was adapted to so extensive a country as America, embracing many climates and containing inhabitants so very different in manners, habits and customs. He repeated the objections which had been elaborated in the Federal Convention, that sixty-five members, the number allotted to the Lower House of Congress, could not possibly know the situation and circumstances of all the people in so numerous a country. But his principal complaint was, that the new plan converted the Confederation into one general consolidated government, "one of the worst curses that could befall a nation." Yet if amendments were produced which would secure the rights of the people, he would gladly agree to the new plan.<sup>1</sup>

Pendleton saw no danger in the new plan. The cause of alarm was rather on the other side, the rejection of government and the dissolution of the Union. The form of the preamble "We the people" was a common one and a favorite with him, because none but the people could delegate power. The objection that the Union should be of the State governments and not of the people, he thought wholly baseless, because the State governments would

<sup>1</sup> Id., 29-33; June 4, 1788.

have nothing to do with the Union; otherwise the people could not be the final judge of the plan. To Mason and Henry, who argued that the power of Congress was too great, he replied, that the Convention had ample authority to propose any plan; the choice now lay between the one it had proposed, or no government at all.<sup>1</sup> The new government would be of laws, not of men.<sup>2</sup> This also was his answer to the charge that the Constitution would establish a consolidated government which would annihilate that of the States.<sup>3</sup>

But Henry, ever elaborating his first premise, declared against the dangers of the plan. Were these not shown from the difficulty of its amendment, in that three-fourths of the States must agree to any change, and two-thirds of Congress, or of the State legislatures were necessary even to propose amendments? The expectation was altogether too great. One-tenth of the population of the United States, inhabiting the four smallest, might obstruct the most necessary amendments.<sup>4</sup> The standing army, which the new plan established, would be more than a match for any disapproval of the conduct of the new government by the people. The excessive power of legislation over the Federal district would establish tyranny.<sup>5</sup> Even the control of the militia, the last and best defense of the States, had been taken away from them.<sup>6</sup> A consolidated empire, such as was now proposed, would have no real checks and balances, and the unlimited power

<sup>1</sup> See the elaboration of this argument in the *Federalist*, No. XL.

<sup>2</sup> The expression occurs in the Declaration of Rights of the constitution of Massachusetts, 1780, Article XXX.

<sup>3</sup> Elliot, III, 35-41.

<sup>4</sup> Id., 49, 55.

<sup>5</sup> Id., 51.

<sup>6</sup> Id., 52.



of taxation would deprive the poor man of his property.<sup>1</sup> The people were protected by no Bill of Rights in the new plan, which in that respect all agreed was not Virginian in character.<sup>2</sup> The people being subject to two sets of tax-gatherers they would be drained dry.<sup>3</sup> There was a worse fault; the whole plan squinted toward monarchy; the President might easily become king, for the army was in his hands.<sup>4</sup>

Partly in reply to Henry, Randolph discussed at length the necessity of establishing a national government and particularly the interest of Virginia to aid in doing so, because of the great dangers and losses she would otherwise incur.<sup>5</sup> His argument was similar to Pinckney's in the late South Carolina convention. Henry and other Anti-Federal speakers were basing their objections largely on the superior guarantees of liberties which such a constitution as that of Virginia afforded. It was necessary to persuade wavering delegates that the interests of the State would be more perfectly conserved under the new plan than by any other government which was likely to be proposed. Randolph was thus meeting the Anti-Federalists on their own ground.<sup>6</sup>

To Henry's objections, Madison made elaborate and specific replies, showing that the dangers apprehended existed in each case only in Henry's mind, for the powers of Congress were guarded by limitations; the infirmity of the Confederation, he said, proved the necessity for a

<sup>1</sup> Id., 54-55.

<sup>2</sup> Id., 55-56.

<sup>3</sup> Id., 57.

<sup>4</sup> Id., 58, 59; June 5, 1788.

<sup>5</sup> So Nicholas urged the adoption of the Constitution as otherwise the northern neck of the eastern shore would separate from Virginia; Elliot, III, 101.

<sup>6</sup> Id., 65-85.

strong government. Moreover the parts of the new plan, in every instance, were answerable to the people. If the general government was wholly independent of the States usurpation might be expected, but it derived its authority from the same source from which they derived theirs. The members of the federal government would be chosen from the same body of men from which the State legislatures were composed. Instead of the tendency of public affairs to run toward the annihilation of the State governments, Madison believed it would be the other way; the State governments would counteract the general interest.<sup>1</sup>

To the objection that New England and the other northern States would combine and control the South, it was replied, that the population of the South would soon exceed that of the North, as its country was well settled, while the South had extensive uncultivated tracts.<sup>2</sup> A great part of Anti-Federal attack on the new plan was veiled in an excessive eulogism of the British Constitution,<sup>3</sup> the more paradoxical because the Anti-Federalists claimed to be the apostles of democracy. In reply the Federalists brought forward evidence to prove that the Constitution would give greater security to the people than could a government on the English model, for did not everyone know that the British system established a standing army, abridged the liberties of the press, overtaxed property of all kinds and infringed all the rights of conscience?<sup>4</sup>

Corbin saw in the new government not a consolidated, but a representative Federal Republic, which would place the remedy for public evils in the hands that would feel

<sup>1</sup> Id., 86-97; June 6, 1788.

<sup>2</sup> Nicholas, Id., 102.

<sup>3</sup> It runs through the debates; Elliot, III, 97-219.

<sup>4</sup> Id., 103.

them and not within the keeping of those who caused the disorder; he saw nothing in the extent of the country that could render the proposed government oppressive.<sup>1</sup> With larger vision than had most of his contemporaries, he saw in the new government a political system that might extend over all the western world, and indeed one which could know no limitation of territory.<sup>2</sup> This was the more remarkable, because Hamilton, Morris and the more ardent Federalists in the Philadelphia Convention had hesitated to attempt a representative government for a country extending like ours from Canada to the Floridas and from the Atlantic to the Mississippi.<sup>3</sup> Expansionists were rare in 1787.

Mason wished to limit the general government, first, to requisitions, and not until these had been refused,<sup>4</sup> to suffer it to exert the power of taxation,<sup>5</sup> but Randolph replied that refusal or neglect would produce war; a sufficient reason for approving this part of the plan,<sup>6</sup> and he objected to the unconnected and irregular manner in which the Anti-Federalists attacked detached parts of the Constitution, without considering the whole, and as Rutledge had said of Lowndes' argument in the South Carolina convention, Randolph now stigmatized Henry's as "disingenuous and unreasonable."<sup>7</sup> Henry quoted the

<sup>1</sup> Id., 107. See objections to the proposed plan from extent of territory answered in the *Federalist*, No. XIV, by Madison. It first appeared in the *New York Packet*, November 30, 1787. This number may have been republished in some of the Virginia papers. See Washington to Madison, December 7, 1787; Sparks, 285; to Hamilton, November 10, 1787; Id., 275.

<sup>2</sup> Elliot, III, 108.

<sup>3</sup> Elliot, V, 202.

<sup>4</sup> As proposed by one of the South Carolina amendments.

<sup>5</sup> Elliot, III, 118.

<sup>6</sup> Id., 119.

<sup>7</sup> Id., 122.

political maxims found in the Virginia Bill of Rights and founded most of his objections to the Constitution on them. It was in the discussion of such general propositions, that he spoke with greatest power. He was seldom correct, either in his description or interpretation of administrative functions, and yet, it was against the administrative features of the new plan that Anti-Federalist attack was chiefly directed. His defense of the Articles of Confederation might have led a person, unfamiliar with the history of the country, to believe that they embodied one of the most perfect political systems and that only a more consistent respect for the maxims of liberty was necessary in order to remedy any defects they might have.<sup>1</sup> Thus he preferred requisitions to taxes, direct or indirect,<sup>2</sup> and equal representation, to proportional.

At this time the navigation of the Mississippi was the subject of adjudication between the United States and Spain. Seven States in Congress, Henry asserted, had voted in favor of giving control of the river to Spain for a long period, which the six Southern States opposed. The danger, he said, showed what a bare majority in Congress might do, and he used the illustration as an objection to empowering a mere majority to levy taxes.<sup>3</sup> He saw no relief from the danger in the new plan, and, in its economical workings, only an increase of national expense.<sup>4</sup> The defects of the proposed system were so numerous, no union could be expected unless it was amended. New Hampshire and Rhode Island had rejected it;<sup>5</sup> New York and North Carolina were reported to be strongly against it, and it was not likely, he said,

<sup>1</sup> Id., 141.

<sup>3</sup> Id., 151-152.

<sup>2</sup> Id., 148.

<sup>4</sup> Id., 157.

<sup>5</sup> Henry was speaking on the 9th of June, 1788. The news of the Ratification by New Hampshire had not then reached Virginia.

that the former would ratify.<sup>1</sup> Massachusetts had proposed amendments and the minority in Maryland had attempted to do so. The States which had ratified had done so strictly for selfish reasons, like Connecticut and New Jersey, being influenced by the prospective advantages of trade. Of course, the non-importing States would favor the plan as they were to participate in the profits hitherto exclusively enjoyed by their more successful rivals.<sup>2</sup> The country had had a dictator, but not yet a President, nor was it likely that a set of Presidents would be found of the breed of the American dictator of 1781.<sup>3</sup> Henry was by no means persuaded that separate confederacies would ruin the country. To his mind a consolidation of one power, ruling America with a strong hand, was the greatest evil to be feared, and he agreed with Mason that one government could not reign without absolute despotism over so extensive a country as ours.

It was this conviction which led him to pronounce small confederacies only little evils. Virginia and North Carolina, if so disposed, could exist, separated from the rest of America; in proof of which he cited the cases of Maryland and Vermont, which had not been overrun when out of the Confederation. Though he did not advocate the confederation of Virginia and North Carolina, he clearly intimated that their union might be preferable to a Union under the Constitution.<sup>4</sup> Virginia, the largest State in the Union, the most populous, wealthy and influential,<sup>5</sup> together with North Carolina, and possibly New York, both of whom were reported to be strongly against the plan,<sup>6</sup> might yet dictate terms. New Hampshire and Rhode Island had refused to become federal.

<sup>1</sup> Id., 157.

<sup>2</sup> Id., 158.

<sup>3</sup> Id., 160.

<sup>4</sup> Id., 161.

<sup>5</sup> Id., 142.

<sup>6</sup> Id., 157.

Evidently Henry had in mind Jefferson's letter, about nine States ratifying and four rejecting the Constitution. But Randolph corrected Henry's use of Jefferson's letter and interpreted it as meaning, not that he wished Virginia to reject the Constitution, but on the contrary wished it adopted by nine States in order to prevent a schism in the Union;<sup>1</sup> a calamity, which Pendleton declared would be an incurable evil, "because friends falling out never cordially reunite."<sup>2</sup>

Particularly did Henry warn his colleagues against the power over elections, given to Congress and devised to deprive the people of their proper influence in the government, by destroying the force and effect of their suffrage.<sup>3</sup> But it was useless to try to answer Henry in any way, because of his manner of attack; no man could tell at what point he would make assault or what provision he would discuss, for at no time throughout the debate did he adhere to the rule of procedure adopted at the beginning, and his vehemence and disregard of parliamentary rules did much to neutralize the effect of his words. Moreover, he never considered himself answered. His facts were in doubt, as for example, his statement that New Hampshire and Rhode Island had rejected the Constitution. Lee, of Westmoreland, corrected him, at this point; New Hampshire had only postponed her decision till that of Massachusetts could be known, and Rhode Island had "so rebelled against justice, and so knocked down the bulwark of probity, rectitude and truth, nothing rational or just could be expected from her." She had not called the convention to debate the Constitution, much less had she formally refused it, and he demanded Henry's

<sup>1</sup> Id., 200.

<sup>2</sup> Id., 304.

<sup>3</sup> Id., 175.

evidence that New York and North Carolina had rejected it. Pennsylvania, Delaware and New Jersey were quite as capable of judging of the general welfare as was Virginia and they had not been tricked into a rejection;<sup>1</sup> none of the ratifying States had acted merely for local reasons.

One of Henry's attacks was a withering criticism of Randolph's inconsistency in withholding his signature to the Constitution in Philadelphia and urging its adoption in Richmond. "What an alteration," said he, "a few months has brought about." The thrust went home and put Randolph on the defensive, much to the amusement of the Federalists. Even the strong rejoinder which Randolph made in self-defense did not explain away the inconsistency of his action.<sup>2</sup> He declared that he still had objections to the Constitution, such as had appeared in his public letter, but he answered Henry, that he was now willing to take the Constitution, because he saw Virginia in such danger that even if the defects of the plan were greater, he would adopt it.<sup>3</sup> There were strong suspicions among the Federalists that, at heart, Randolph had all along been a friend of the new plan, and Washington doubtless reflected their sentiments when he wrote to Lafayette, that if Randolph opposed the Constitution at all in the Richmond convention, he would do it feebly;<sup>4</sup> for it was conjectured that he wished that he had been among the subscribing members.<sup>5</sup>

Ratification in Virginia, it was now apparent, would depend, as Randolph said, on amendments, though he

<sup>1</sup> *Id.*, 183-184.

<sup>2</sup> *Id.*, 187, et seq.

<sup>3</sup> *Id.*, 191.

<sup>4</sup> Washington to Lafayette, April 28, 1788; Sparks, IX, 356; see also letter to John Jay, June 8, *Id.*, 373.

<sup>5</sup> Washington to Madison, October 10, 1787; *Id.*, 269.

conceived that the great question was the preservation of the Union.<sup>1</sup> With him the chief reason for adoption by Virginia was the danger in which the State would stand if it rejected the plan and refused to enter the Union,<sup>2</sup> of which thought a great portion of his argument for ratification was an elaboration. She would not be able to form an independent government, and having a long and exposed frontier, would be unable to protect herself. Though the argument was based on local and selfish grounds, it evidently had great weight with some of the doubtful delegates, most of whom were from Kentucky and Western Virginia, for all were convinced, except possibly Henry and a few of the extreme Anti-Federalists, that the Confederation was wholly inadequate to the needs of the State. Even in the "sweeping clause," as it was called by Henry,<sup>3</sup> Randolph detected nothing formidable.<sup>4</sup> It had been inserted, he said, only for greater caution, to prevent the possibility of encroaching upon the powers of Congress. Taking the various provisions of the article together, in which the powers of Congress were defined, the plain and obvious meaning was only to provide for the common defense and general welfare.

But Henry was not the only Anti-Federalist who attacked the Constitution; James Monroe earnestly supported him. His mind turned with yearning to the confederacies of old, and to that ideal confederacy which he thought ought to be formed for America.<sup>5</sup> Experience had shown wherein the defects of the existing government lay; and these should be remedied. The grave danger

<sup>1</sup> Elliot, III, 194; June 10, 1788.

<sup>2</sup> Id., 195.

<sup>3</sup> Id., 150, Constitution Article I, Clause 8, Section 18.

<sup>4</sup> Id., 206.

<sup>5</sup> Id., 207, et seq.



of adjusting territorial claims had passed away and the States had made their cessions to the general government; certainly this intimated what might be done. The isolated position of the country forbade fears of European interference. It was not to the advantage of the United States to make trade-compacts with any nation; for our ports should be open to all, but no exclusive privileges should be granted to any. The country, he believed, was in no danger of immediate disunion, and the defects of the Confederation might be remedied calmly and dispassionately.<sup>1</sup>

Among the many other objections to the new plan, he saw, in the extensive territory reaching to the Mississippi, a sufficient reason for rejecting the Constitution, for only a despotic monarchy could be expected to govern so vast an area.<sup>2</sup> No object known to taxation could be reached in so vast a field; and a thousand circumstances made it clear to him that no law could be made which would operate uniformly throughout the United States.<sup>3</sup> The vast powers given to the new government by which it would absorb the resources of the country at the expense of the States and collect into its service the most eminent men in the country, it was evident would establish a tyranny, for they contemplated objects with which a Federal government ought never to interfere.<sup>4</sup> These powers should be carefully qualified. He saw imminent danger in the "sweeping clause," for Congress would be under no restraint from making any law, however oppressive in its operation, which it might think necessary to carry its powers into effect.<sup>5</sup> Instead of a division of powers, in which the security of the people would

<sup>1</sup> Id., 213.

<sup>2</sup> Id., 225.

<sup>3</sup> Id., 218.

<sup>4</sup> Id., 217.

<sup>5</sup> Id., 218.

lie, here was a coalition of powers and a division of sovereignty between national and State governments; between which a compact must be inevitable. He could see no real checks in the new plan.<sup>1</sup> In the history of mankind he found no example of a concurrent exercise of power by two parties without a struggle between them, and, taking up the organization of the two Houses, that of the executive and the judiciary, he pronounced the proposed government dangerous and calculated to secure neither the interests nor the rights of the people.<sup>2</sup>

Mainly in reply to Henry, though at the same time to Monroe, John Marshall argued that the powers granted in the plan were necessary, and were adequately guarded.<sup>3</sup> It was necessary to give the government power in time of peace to prepare for war; because foreign dangers would arise. Self-protection was the first duty of nations. It had not been the Confederation, but the enthusiasm of the people which carried them through the Revolution.<sup>4</sup> The Anti-Federalists had concentrated their objections upon the power of Congress to levy taxes. Marshall answered them completely, showing that the representatives chosen from the different parts of the country would be fully capable of knowing upon what objects to impose taxes, and also to what extent to carry them.<sup>5</sup> The immediate responsibility of the law-makers to the electors would be ample security for the public. It was folly then to talk of the abuse of legislative powers. The weakness of the Confederation was the true cause of all complaint respecting the navigation of the Mississippi. A strong government would not hesitate to control its own. And Marshall very correctly informed the House

<sup>1</sup> Id., 219.

<sup>2</sup> Id., 222.

<sup>3</sup> Id., 222, 227.

<sup>4</sup> Id., 228.

<sup>5</sup> Id., 230.

that the prospect of ratification in New Hampshire was encouraging, for he had heard that the representatives in its convention having found, after assembling, that they were instructed to vote against the Constitution, had returned to their constituents without determining the question, in order to convince them of their mistake and of the propriety of ratification.<sup>1</sup>

The frequent reiteration of the objection that the country was too extensive for a republican government, led Marshall to say that the objection might be true of governments in which representation did not exist. Extent of country might render it difficult to execute laws, but not to make them. Extent of country did not extend power. That which would be sufficiently energetic and operative in a small territory would be feeble when extended over a large one. The Anti-Federalists seemed, for a time, to forget that eulogism of checks and balances in the American system which had been so long in every man's mouth. In America there was no exclusive personal stock of interest, for in promoting his own, the individual promoted the interest of the community. In consulting the common good he consulted his own, which was the best check a government could possess.<sup>2</sup> As the eulogy of the British Constitution was a matter of opinion, even among the Anti-Federalists, it was sufficiently met by Marshall, when he said, that for America, at least, the government proposed was much superior to that of England. Would Senators for life be more agreeable? Or a House of Representatives chosen by a hundredth part of the people? Or a President unaccountable to them for his conduct? When Marshall resumed his seat, no objection which Henry had brought forward remained unanswered.

<sup>1</sup> Id., 232.

<sup>2</sup> Id., 232.

Mason's objections to the Constitution did not differ from those which he had already published.<sup>1</sup> Instead of a general power of taxation, he would grant conditional powers, and in strong colors, he depicted the evils of a grievous poll tax and an inequitable tax on lands.<sup>2</sup> He saw fearful dangers in the article which pronounced the Constitution, the laws of the United States and the treaties made by its authority, the supreme law of the land, binding the judges in every State. Here, clearly, the Constitution which had no Bill of Rights would be of higher authority than the Bills in the State constitutions, and everyone knew that these laid down the first principles of government.<sup>3</sup> Much of his argument was inferential, as for example, that, because the people of the United States were enjoying independence, and were happy and respectable, therefore the Articles of Confederation under which they lived must afford a sufficient government, if its obvious defects were corrected and it was strictly carried out. He did not see the need of a more perfect Union,<sup>4</sup> nor could he agree with Randolph that it would materially benefit Virginia.

Grayson went even further than Mason and asserted that the adoption of the Constitution would not ameliorate the condition of the country.<sup>5</sup> Reviewing public affairs since the Revolution, he said that the country had friendly relations with foreign powers; had adjusted the public debt between the individual States and the United States

<sup>1</sup> The objections of the Hon. George Mason, to the proposed Federal Constitution. Addressed to the citizens of Virginia. Printed by Thomas Nicholas (1787). See James Iredell's answers to Mason in McRee's Life of Iredell.

<sup>2</sup> Id., 263-266.

<sup>3</sup> Id., 266. Mason was the author of the Virginia Bill of Rights of 1776. See joint resolution of the Virginia Legislature, February 15, 1844.

<sup>4</sup> Id., 269.

<sup>5</sup> Id., 274.

by the arrangement for the sale of western lands (referring to the Ohio and other companies, and the authority given the Treasury Board to authorize land sales in Europe) and he was confident that the domestic debt would soon disappear. Were there not sixteen American vessels carrying sea letters in the East India trade, and two hundred entering and clearing the French West Indies, every year?<sup>1</sup> In brief, whatever faults of government existed in America, they were of the people, and not of the Articles of Confederation, and not one of them did he think would be cured by the new plan.<sup>2</sup> Even the colossal frauds of paper-money issues did not disturb Grayson, though he confessed that by the charms of magic the millions struck off had diminished by a forty-fold ratio, yet, however unjust or unreasonable this might be, he thought it warranted by the inevitable laws of necessity.<sup>3</sup> But he believed that there was no disposition to continue such issues "as this engine of iniquity" was universally reprobated.

Many Anti-Federalists claimed to believe, as did Monroe, that the power of direct taxation, in Congress, was unnecessary because the sale of western lands would be abundantly sufficient to answer all federal purposes.<sup>4</sup> If the objections were well founded and the opponents of the plan believed that Congress would never have need to lay direct taxes, Pendleton inquired, why was there any dispute. If the Anti-Federalists opposed the surrender of the navigation of the Mississippi, they should give their support to the new plan, for by it two-thirds of the members of the Senate, from nine States, and the President would be requisite to make a treaty. It was well

<sup>1</sup> Id., 266.

<sup>2</sup> Id., 281-282; June 13, 1788.

<sup>3</sup> Id., 290.

<sup>4</sup> Id., 300.

known that negotiations were pending by which Spain should have the navigation of the river for twenty-five years, after which the United States should retain it forever. Certainly, under the new plan, the prospect was the more assuring of securing the control of the river immediately.<sup>1</sup>

Henry now returned vigorously to the attack. The necessity of amendments, he claimed, was universally admitted, for even Jefferson had advised nine States to adopt and four to reject the plan till proper ones could be made.<sup>2</sup> Such could not be expected from North Carolina and New York, as these States were surrounded by Federalist walls; therefore they must emanate from Virginia. No part of the plan was more odious to Henry than that the power of the President and "a few Senators," in the most unlimited manner should make treaties, and "all under the abominable veil" of political secrecy. Here he saw the portent of the loss of the navigation of the Mississippi.<sup>3</sup> Surely different objects of taxation in the thirteen different States would involve the country in an infinite number of inconveniences and in absolute confusion. The contrariety of interests, he believed, would make uniform taxation impossible and the evil would be aggravated because the new plan subjected everything to the northern majority, which had already shown itself willing to surrender the navigation of the Mississippi, and would always stand ready to sacrifice the South.<sup>4</sup>

Replying to Henry, Madison cited Jefferson's well-known letter on ratification as evidence of the author's

<sup>1</sup> Id., 302.

<sup>2</sup> Id., 314-315; see the note page 213, post, on Jefferson's letter. It had been used by the Anti-Federalists prior to the election to influence votes against the Constitution.

<sup>3</sup> Id., 316.

<sup>4</sup> Id., 327-328.

approval of the Constitution, and especially of the several parts which had been reprobated with such vehemence by the Anti-Federalists in the convention. Jefferson, he said, was captivated with the equality of suffrage in the Senate, which Henry called the rotten part of the Constitution. Henry had dilated on the omission of a clause declaring security for religion. Madison replied that if there were a majority of one sect, a Bill of Rights would be a poor protection. It was well known that the people of the States enjoyed the utmost freedom in religion, which arose from the multiplicity of sects in America, and which was the best and only security for religion in any society. As no such was in the majority, there would not be a persecution of the rest. The general government had not a shadow of right to intermeddle with religion. Correcting Henry further, Madison denied that seven States had ever been disposed to surrender the navigation of the Mississippi. When its cession to Spain had been proposed by southern States, the northern had opposed it. New Jersey had explicitly instructed her delegates to vote against it; therefore Henry's argument against ratification, because of the threatened surrender of the navigation of the great river, fell to the ground. Henry had drawn a dark picture of the dangers which he apprehended from the new plan, not the least of which was his dread of iniquitous speculation and stock jobbing in the operation of the new system, to which Madison answered that, judging from what had happened under the Confederation, any change would render amelioration in this respect probable.<sup>1</sup>

The purpose of the Anti-Federalists in bringing forward the action of Congress relative to the Mississippi,

<sup>1</sup> Id., 332.

was to influence the Kentucky delegates against the Constitution.<sup>1</sup> The subject was quite irrelevant to the question of ratification, but was utilized by Henry, Monroe and Grayson as an objection to the new plan inferable from the conduct of Congress under the Articles. They claimed that the offer of surrender had emanated from northern States; that, by the new plan, these would be in the majority, and, therefore, the South would be in the same danger as before. As Grayson put it, the Mississippi was not secured under the old Confederation, but was better secured than it would be under the new Constitution. By the Articles, the consent of nine States would be necessary to yield the navigation, while by the proposed plan a few States could give it away.<sup>2</sup>

To all this Madison replied, that it was never the wish of the people at large, or of the eastern States in particular, to make the surrender. It was to their interest, even more than to the South, to maintain control of the river; for, as the carrying business was the natural occupation of the North, it naturally would support a measure which encouraged agriculture in the West and contributed to the carrying trade. The emigration which was going on into the West must affect the eastern States just as it did the southern. He believed that neither the Confederation nor the new Constitution involved the right of giving up the navigation of the Mississippi. It would be repugnant to the law of nations, though emergencies might arise under which the control of the river might be granted for a time. The surrender of that control to Spain for twenty-five years, as had been suggested, by seven States, had been made on the ground of reciprocity. The manufactures of Spain were to be imported and

<sup>1</sup> Elliot, III, 361; June 13, 1788.

<sup>2</sup> Id., 343.



sold in America, and the productions of America in Spain, by an arrangement of reciprocity which must benefit both countries. But there had been no idea of absolutely alienating the control of the river, it being understood that the temporary cession would fix the permanent right in favor of America and prevent a dangerous coalition between Spain and Great Britain.

Madison did not hesitate to say that he had uniformly disapproved of the proposition and did so now.<sup>1</sup> The rational grounds against the cession of the river lay in the inevitable diminution of the value of the western country, which was considered the common fund for the States, and consequently the impoverishment of the public treasury. There can be no doubt that Madison's vigorous disapproval of the cession went far to convince the Kentucky delegates that it would never be made, for his activity in securing the proposed Constitution was well known, and the stand he now took fully answered the objections which Henry had brought forward relative to the surrender of the river. Certainly the last objection vanished when Madison declared that if he were at liberty to speak freely in the matter, he could convince the House that the project would never be revived in Congress, and therefore no danger was to be apprehended.<sup>2</sup>

But both Grayson and Henry returned to the subject, Henry at least throwing some light on the purpose of the Anti-Federalists when he observed that in the discussion of the navigation of the Mississippi, the opponents of the Constitution were accused of "scuffling for Kentucky votes."<sup>3</sup> It appeared, however, that from the time Madison spoke on the subject most of the delegates were convinced that a President and two-thirds of the Senate,

<sup>1</sup> Id., 344-346.

<sup>2</sup> Id., 351.

<sup>3</sup> Id., 349.

necessary, under the Constitution, to make a treaty, would never be found willing to surrender the river.<sup>1</sup>

The chief defender of the new plan was Madison. Monroe inquired of him why an exception had been made as to the place of electing senators, in the clause giving Congress power to control elections. The reason, replied Madison, was, that otherwise Congress might compel the State Legislatures to elect senators in a different place from that of their usual session, which would produce some inconvenience, and was not essential to the regulation of elections, but it was necessary to give the general government a control over the time and manner of choosing senators, in order to prevent its own dissolution.<sup>2</sup> The control over the election of representatives was to secure uniformity throughout the continent. It had been judged proper that the general government should be empowered to give a remedy in case the people of any State should be deprived, by any means, of the right of suffrage; but to fix the time, place and manner of the election of representatives was impossible in the Constitution, these could best be left to the State governments which were more intimately acquainted with the situation of the people and the power to secure it. Uniformity would prevent the dissolution of the general government.<sup>3</sup>

Henry objected that, as the Constitution stood, a Senator or a Representative might be appointed to an office which was not created, or the emoluments of which were not increased, during his term. Madison answered that it would doubtless have been best to fix the compensations in the Constitution so as to be independent of Congress

<sup>1</sup> *Id.*, 357.

<sup>2</sup> Compare Hamilton's discussion of this point in the *Federalist*, Nos. LIX, LX and LXI.

<sup>3</sup> *Elliot*, III, 366-367.

or of the State Legislatures, but the uncontrollable fluctuation of the value of money and currency forbade the one, and experience under the Articles prevented the other; for the States had been influenced by local considerations, which would ever produce discrimination in the amount of pay.<sup>1</sup> Tyler and Grayson feared that Congress would fix the compensation so low as to exclude poor men and thus establish an aristocracy; to which Madison made answer that as the people were to choose their representatives, they would settle this question themselves.<sup>2</sup>

Grayson lamented the omission of a clause prohibiting nepotism; and objected to the power of the Senate to propose or concur in amendments to money bills. He preferred the British model. Whatever the practice in Great Britain, Madison replied, there was a sufficient difference between the two countries to render it inapplicable to our own; moreover, the matter was of no great importance; the House of Representatives would be judges of the propriety of the Senate's amendments, and the experience of Virginia justified the clause. The Virginia House of Delegates had been known to spend weeks in forming a money bill, and because the Senate had no power to propose amendments,<sup>3</sup> the bill had been lost altogether, and it had been necessary to introduce a new bill, which the insertion of a single line by the Senate would have prevented.<sup>4</sup>

The power of Congress to call forth the militia to execute national laws was attacked by Mason, as it had been in the Philadelphia Convention, and for the same reasons; and the chief of which was the danger of estab-

<sup>1</sup> *Id.*, 369.

<sup>2</sup> *Id.*, 372.

<sup>3</sup> Constitution, 1776, Section 5.

<sup>4</sup> *Elliot*, III, 377.

lishing a standing army.<sup>1</sup> Madison's reply was complete; that the most effectual way to guard against a standing army, which he thought one of the greatest mischiefs that could possibly happen to a country, was to render it unnecessary, which could be effected by giving the general government full power to call forth the militia and to exert the whole natural strength of the Union when needed. He did not believe that a government "of a federal nature consisting of many co-equal sovereignties," and, particularly, having one branch chosen from the people, would drag the militia, without a cause, to an immense distance.<sup>2</sup> Such an abuse of power would incite public indignation and defeat its purpose. Moreover, the power over the militia was concurrent, not exclusive.<sup>3</sup>

But Mason and Henry persisted in representing the British system as superior, at every point, though Madison showed that the restrictions in that system, of which the Anti-Federalists made so much, were all directed against the power of the executive; whereas, in the proposed system, all the powers of government were limited and guarded, and the representatives would be more responsible to the people than were the members of the House of Commons.<sup>4</sup> Henry insisted that the incentives to constitutional action, which distinguished the King of Great Britain, would not be found in the Constitution. The President's interests would be transient. The sword and the purse were not united in the same hands

<sup>1</sup> This objection is fully answered by Hamilton in the *Federalist*, Nos. XXIV and XXV.

<sup>2</sup> Elliot, III, 381.

<sup>3</sup> Id., 382. Compare Hamilton's argument on this point in the *Federalists*, No. XXIX, which appeared originally in the *Daily Advertiser*, January 10, 1788. In some editions of the *Federalist*, this number is incorrectly given as No. XXXV; it is No. XXIX in the first edition.

<sup>4</sup> Elliot, III, 383.

under the British system as they would be in the one now proposed. The security of the people demanded their separation.<sup>1</sup> Madison replied that the objection was totally inapplicable to the plan. Henry could not mean that the sword and purse ought not to be trusted in the hands of the same government; for there never was, nor would there ever be, an efficient government in which both were not vested. The only rational meaning must be, therefore, that they were not to be given to the same member, which, in the case of the British government, meant that the sword was in the hands of the Crown; the purse in the hands of Parliament. As far as any analogy could exist between the two Constitutions, it would be so in America. Here the purse was to be in the hands of the representatives of the people; they appropriated all moneys, regulated the land and naval forces and called forth the militia. The President was to be in command, and, in conjunction with the Senate, to appoint the officers. The means ought to be commensurate to the end, and the end was the common protection, which could not be effected without a general power to use the strength of the Union. The Constitution, he said, was based on republican principles of government; power must be lodged somewhere.

The practical question was, in what part of the government to place it, and not whether any other political body, independent of the government, should have it or not. In Virginia and in other States in the Union, the relaxed operation of government had been sufficient to alarm the friends of good order. Population was increasing rapidly in every State, and additional checks on dissipation and licentiousness were needed. A change was absolutely necessary, and the friends of republican

<sup>1</sup> Id., 388.

government were called upon to endeavor to establish an adequate system. Madison could see no danger in submitting to practices and experiments, which, in theory, seemed to be founded on the best principles. But he was specific in his reply to Henry and Grayson, who claimed that the Constitution proposed did not compare with the British system, in fixing responsibility. If the number of members of Parliament elected by the influence of the Crown was deducted from the total membership of the House of Commons, the remaining members would not bear a greater proportion to the population of England than the number of representatives in Congress, as fixed by the Constitution, would bear to the United States. Even if this were not true, there would be a still greater responsibility in the proposed plan. Members of the House of Representatives were to be chosen for two years; members of Parliament were chosen for seven. Any citizen might be elected to Congress, but, in Great Britain, no one could be chosen to represent a county unless he had an estate of the value of six hundred pounds sterling a year, nor could he represent a corporation without having an annual estate of three hundred pounds.<sup>1</sup> His conclusion, therefore, was a just one: that if confidence was due to the government in England, it was due tenfold in America.<sup>2</sup>

But even this exact analysis wrought no conviction in Henry's mind. He saw in it only a confession that the government to be formed was national and without a single federal feature. Its friends had alleged that it was national or federal as might best suit their argu-

<sup>1</sup> For the property qualifications of Senators and Representatives in the State governments at this time see my *Constitutional History of the American People, 1776-1850*, I, 68-71, 77-79.

<sup>2</sup> Elliot, III, 395.

ments, but now all doubt was past. The State governments would form no part of the new plan. The most essential objects of government were to be administered by Congress. If the government was to be republican, it was to be consolidated not confederated, and Henry saw no safety for the country in such a plan.<sup>1</sup> Lee, of Westmoreland, very properly complained that the opponents of the plan paid no regard to the necessity of the Union, which was the great object before the country.

Some of the Anti-Federalists declared that, under the power in the Constitution to regulate their compensation, the wages of members of Congress would be so low that the rich alone could serve, while another objector asserted that they would be so high as to ruin the country. The concession of the Federalists that the objects of the government were general and equally affected the interests of the people of every State, did not warrant Henry's conclusion that the plan was to establish a national government. Henry's proof, he said, consisted in ascribing infinitude to powers clearly limited and defined for certain designated purposes.<sup>2</sup> But Henry repeated his objections to a standing army, which, he said, the power of Congress over the militia would make possible. Corbin replied that all confederate governments had the care of the national defense, and that Congress ought to have it. As the United States explicitly guaranteed to every State in the Union a republican form of government, and was under obligation to protect each from invasion and domestic violence, he thought there was ample power in the States to use their own militia and to call on Congress for the militia of other States.<sup>3</sup> Moreover, as representa-

<sup>1</sup> Id., 395-399.

<sup>2</sup> Id., 405-406.

<sup>3</sup> Compare Madison's argument on the same point in the *Federalist*, No. LXIII. It appeared in the *Independent Journal* January 22 (?) 1788.

tives were chosen every second year, it would be practically impossible to make laws which would destroy the States.<sup>1</sup> John Marshall pointed out that Congress was empowered to call forth the militia only for continental purposes, but the Constitution did not say that the power given to the States by the people was taken away. He thought it unquestionable that the State governments could call forth the militia under the Constitution in the same manner as they could have done under the Articles.<sup>2</sup> But this interpretation was rejected by the Anti-Federalists.

Mason argued that the exclusive power of Congress over the Federal district would be exceedingly dangerous, as the power might be extended without limitation, and the district under Congress become the sanctuary of the blackest crimes. As the Federal courts were to sit there, the danger was the greater.<sup>3</sup> Madison's reply was sufficient, that it would seem to be the last thing to enter into the mind of any man to grant exclusive advantages, within a very circumscribed district, to the prejudice of the community at large. But Grayson saw in the proposed Federal District a rendezvous for fugitive slaves, who, until the District was made a State, would not be given up; for the executive of a State "could not apply to the ten mile square" for their rendition. It is doubtful whether such far-fetched objections as this influenced even the most wavering members.<sup>4</sup>

It was now the fourteenth of June, and the debate had continued long enough to establish a general conviction that defects in the Constitution might be remedied by amendments. Henry announced that the necessity of a

<sup>1</sup> Elliot, III, 417.

<sup>2</sup> Id., 419.

<sup>3</sup> Id., 431.

<sup>4</sup> Id., 434.



Bill of Rights in the new government appeared to him greater than for any government that had ever been established, and Mason specified one amendment necessary, that the rights not given to the general government were retained by the States.<sup>1</sup> Henry based his argument largely on the fact that the Constitution of Virginia had a Bill of Rights. Nicholas answered that this was not a conclusive reason for adding one to the proposed Constitution; rather was the burden of proof on Henry to show that it was necessary to the Constitution of Virginia. Several State Constitutions had no such Bill,<sup>2</sup> and yet they were States as free as Virginia, and their liberties were as secure. In Virginia, all powers were given to the government without any limitation, but it would be different in the general government, to which certain special powers would be delegated for certain purposes. It was an unsettled matter whether it was safer to grant general or limited powers. A Bill of Rights was no security,<sup>3</sup> and in Virginia it had been violated in many instances.

Henry had objected that the Constitution did not declare the common law to be in force.<sup>4</sup> This Nicholas pointed out was an advantage, because otherwise the law would be immutable, while now Congress could modify it according to the demands of the country; but the common law was not excluded, as the Constitution was silent respecting it. A Bill of Rights was no more than an

<sup>1</sup> *Id.*, 444.

<sup>2</sup> For the list see page 22, note.

<sup>3</sup> Compare the *Federalist*, No. LXXXIV.

<sup>4</sup> There is no common law of the United States in the sense of national customary law, distinct from the common law of England as adopted by the several States each for itself, applied as its local law and subject to such alteration as may be provided by its own statutes. *Wheaton vs. Peters*, 8 Peters, 591. As to

acknowledgment of the pre-existing claim to rights in the people. They belonged to the people as much as if they had been inserted in the Constitution. This, it may be observed, was the usual argument of the Federalists against the addition of a Bill of Rights.<sup>1</sup> Even admitting that it was proper for the Federal Convention to have inserted a Bill of Rights, Nicholas argued that it was not proper in the Virginia Convention to propose it as the condition of the accession of the State to the Union. Its omission was not a sufficient cause for any member to refuse to ratify.<sup>2</sup>

The convention had now reached the clause allowing the importation of slaves for twenty years. Mason attacked it vehemently, as he had done in the Federal Convention. Madison expressed his regret at its inclusion in the plan, but explained that it was the price of securing the approval of the Southern States.<sup>3</sup> The Union, he said, would be in no worse situation than before. Under the Articles, the slave-trade might be continued forever, but by this clause an end might be put to it after twenty years. A limited tax might be laid on it, in the meantime, otherwise Congress might lay such a tax as would amount to a prohibition of the trade, and he cited, as compensatory, the fugitive slave clause which would secure property in which Virginia was greatly interested, and would be better than any existing law. But he called the attention of the House to the fact that no

the common law of the State constitutions, see the opinion of the Justices of Rhode Island, March 30, 1883, Thayer's cases, 224, and the argument of Daniel Webster in *Luther vs. Borden* (7 Howard, January 27, 1848) Webster's Works, VI, 227.

<sup>1</sup> Federalist No. LXXXIV; Wilson's speech, page 22, ante.

<sup>2</sup> Elliot, III, 450-451.

<sup>3</sup> This reference to the Carolinas and Georgia, as the South, may be compared with the reference made in the South Carolina convention to Virginia as the North; page 62, ante.

power was given to the general government to interfere with property in slaves held by the States; a fact reiterated and amplified and made the basis of innumerable laws and decisions for the next seventy years.<sup>1</sup>

John Tyler, after warmly enlarging on the iniquity of the slave trade, and criticising the Federal Convention for not prohibiting it, very cleverly utilized its neglect as evidence of danger in the plan and of the need of a Bill of Rights. The power of prohibiting the trade had not been expressly delegated to the Federal Convention, yet it would have had it by implication if the restraint running for twenty-one years had not been provided. This being true, could not every member see the danger there was in the plan of an infringement upon the inalienable rights of the States, and he concluded with the assertion that unless the "sweeping clause" was expunged, he should vote against the Constitution.<sup>2</sup> George Nicholas quickly called attention to the inconsistency of these Anti-Federal arguments; the objectors to the Constitution found fault because the slave trade was to continue for twenty-one years, and at the same time because, by some latent operation, slaves were to be emancipated; thus at the same moment the plan was opposed for being promotive and destructive of slavery.

The prohibition on the States to emit bills of credit, or to make anything but gold and silver coin a tender in payment of debts, Henry thought—though admitting they were restrictions founded on good principles—might have the effect of obliging Virginia to pay for her share of the continental money, shilling for shilling. Madison admitted that there had been some speculation

<sup>1</sup> See the history of the Thirteenth, Fourteenth and Fifteenth Amendments, Vol. III post.

<sup>2</sup> Id., 455.

among the States about continental money, and that the validity of claims would not be diminished by the adoption of the Constitution. Mason, taking up Henry's objection, foresaw the bankruptcy of the commonwealth. The amount due would surpass the value of the property of the United States; and as *ex post facto* laws could not be passed, the face value of the debt must be paid. The result would be that in settling so vast a debt the country would be ruined. Why, he asked, ruin the people by taxation from generation to generation to pay that debt? They might be taxed for centuries in order to give advantage to a few particular States in the Union and to a number of rapacious speculators. The enormous mass of worthless money which had been offered at a thousand to one would have to be paid at its full value in actual gold and silver.<sup>1</sup>

Madison answered that it was immaterial who held this quantity of paper money, which had been in circulation before the peace, or at what value they had acquired it, for it would not be affected by the Constitution. The claims against the United States were declared to be valid as they had been, but not more so. Under the Articles of Confederation, its value rested only on the obligation of public faith. It would be so under the Constitution. The people at large would not wish to put the public creditors in a worse situation, and certainly not to defraud them. But the alarm of State bankruptcy had been sounded, and Henry took it up with great vehemence. The South would be ruined. The people of the eastern States had speculated chiefly in this money and had packed away vast quantities in barrels. It had been acquired for the most inconsiderable

<sup>1</sup> Id., 473.

trifle, and if the plan was adopted was to be paid in full. Let the South take warning; its property would be taken from it to satisfy this same infamous speculation.<sup>1</sup> Nicholas answered that the debt would be paid according to real equity; Congress would not enhance its value and the debt would in no wise be increased. Moreover, Congress, and not the States, were answerable to the individual holders; therefore, the individual could call on no State. This would relieve Virginia of the terrible drain which Henry had prophesied.<sup>2</sup>

But though the debt was transferred to Congress, Mason replied, that body would not have the means of paying it. The method of payment was not prescribed in the Constitution; it would therefore come before the Federal Judiciary. The courts would have to decide against *ex post facto* laws; the money would have to be paid in full, and in order to enrich a few, the remaining citizens of the United States must suffer. The Federal government would make the necessary collections and regulate the claims of each holder with equity. In vain did Madison show that the validity of these claims would neither be decreased nor diminished by a change in the Constitution; and that Congress must make the law for redemption with which the States could not interfere. The whole continental debt amounted to a little more than one hundred millions,<sup>3</sup> a considerable quantity of which had been destroyed. At the time when all of it was in existence the quota of Virginia amounted to no more than twenty-six millions. At forty for one, this would amount to about five hundred thousand dollars; an amount which he thought both equitable and honorable. If the situa-

<sup>1</sup> Id., 475.

<sup>2</sup> Id., 477.

<sup>3</sup> Compare with the account of the debt, Vol. I, page 253.

tion of the northern and southern States was reversed, he thought such an objection to the redemption of its real value as Henry and others had made, would, on good grounds, be pronounced by Virginia, very unreasonable.<sup>1</sup>

On the ground of domestic economy, as well as of State sovereignty, Mason objected to the clause prohibiting the States from levying duties on imports and exports, except what might be absolutely necessary for executing their inspection laws. But Madison replied that as all the States were not exporters, the clause had been adopted as being consistent with justice and equity, for otherwise States having the monopoly of the situation might impose heavy contributions on other States for their own exclusive advantage. The provision therefore tended to the common peace and harmony.<sup>2</sup>

All the objections that had been made in the Philadelphia Convention to the executive power vested in the Constitution were repeated with slight variation in Virginia. Mason, Monroe, Henry and Grayson left nothing unsaid to prejudice the members against this part of the plan, whether as to the manner of choosing the President; his re-eligibility; his powers or his association with the Senate in the appointment of officers or making treaties. Everything was objected to. These objections were answered, chiefly by Madison, as they had been answered in the Federal Convention.

The attack on the executive was less fierce than on the judiciary. Mason saw no protection, whatever, of the dearest rights of the community in a Constitution which allowed Congress to establish as many inferior courts as it chose.<sup>3</sup> Nothing would be left to the State Courts,

<sup>1</sup> Elliot, III, 480-481.

<sup>2</sup> Id., 483; June 17, 1788.

<sup>3</sup> Id., 521; June 18, 1788.

and thus the general government would absorb all the powers of the States. To all who thought that one rational consolidated government was best for America, this extensive judicial authority would be agreeable, and he intimated that his fears had been entertained by many members of the Federal Convention.<sup>1</sup> Madison, at this point, demanded an explanation of Mason; insinuations such as this, he thought, put the late Convention in a false light. Mason's answer was a general charge that such a belief was notorious. The powers which the Constitution gave to the federal judiciary he interpreted as being without restraint and liable to be extended to a dangerously oppressive length.

Though much of the jurisdiction granted was unquestionably right he could not see the propriety of giving the judiciary jurisdiction in disputes between a State and the citizens of different States, and between a State and its citizens.<sup>2</sup> The jurisdiction given in all cases, in law and equity, arising under the Constitution and the laws of the United States, would include, he declared, all the officers of the government, therefore they would be taken under the powerful protection of courts which were established under the Constitution; and as the judges were not appointed by the States, all suitors would be at the mercy of the court; therefore justice could not be expected. Moreover, how could a poor man meet the expense of a journey of four or five hundred miles to attend a federal court, and bring with him all his witnesses.

More perfectly to express his objections Mason brought forward an amendment limiting the powers of the judiciary and eliminating the jurisdiction of which he had

<sup>1</sup> Id., 522.

<sup>2</sup> Id., 523.

complained.<sup>1</sup> He would confine the appellate jurisdiction to matters of law, arising only in common law controversies. The State courts could best be trusted with the jurisdiction over controversies between citizens of different States. Such cases could in no wise concern the United States.<sup>2</sup> Moreover, if federal jurisdiction extended over cases arising between a State and the citizens of another State, a sovereign State might be arraigned at a bar of justice like a culprit, and what State would undergo this mortification? What was to be done if judgment was obtained against a State? It could not be executed, and a power which could not be executed ought not to be granted.<sup>3</sup> Again, in a suit between Virginia and a foreign State, was the foreign State to be bound by the decision? A dispute between a foreign citizen or subject and a citizen of Virginia could not be tried in a Virginia court, but must be decided in a Federal court, a provision without precedent in any other country. For men were obliged to stand by the laws of the country in which the dispute originated; the innovation was without precedent. Moreover, it would annihilate the judiciary of the State and prostrate its legislature.

In the unoccupied lands of the country Mason saw a source of endless controversy which would be settled in the national court and against the States. In reply, Madison observed that if Mason's fears were not groundless the danger to the State governments and to their property was possible. The judicial article did not fully satisfy him, and he confessed that he would have had it better expressed. But taking a practical view of it, answered that it was to the interest of the general gove

<sup>1</sup> His amendment is contained substantially in the fourteen proposed by Virginia; *Elliot*, III, 660.

<sup>2</sup> *Id.*, 526.

<sup>3</sup> *Id.*, 527.



ment to promote the general welfare, therefore it could have no substantial reason for violating its duty, nor was anyone warranted, by this part of the plan, in believing that it would prove oppressive. The general purpose of the judicial article was to prevent all cases of dispute with foreign powers, and those between different States, and also to remedy partial decisions.<sup>1</sup>

It might be a misfortune in organizing any government, continued Madison, to empower any of its co-ordinate branches to interpret its authority. But this was the condition in every country, and in organizing the government of the United States no new policy in this respect had been adopted. It was necessary and expedient that, respecting the laws of the Union the judicial power should rank with the legislative. As controversies with foreign nations might arise, a supreme court was necessary to decide them. In the exposition of treaties uniformity was necessary, which could be secured only by establishing one revisionary superintending power.<sup>2</sup> A like reason existed for giving the federal judiciary exclusive jurisdiction in admiralty and maritime cases. Controversies affecting the United States must be determined by their own judiciary and not be left to partial tribunals.

There might be some reason for refusing the federal courts jurisdiction in controversies between a State and citizens of another State. It was not in the power of individuals to call any State into court, therefore the only operation which the judicial articles could have, would be that, if a State wished to bring suit against a citizen, it must be brought before the Federal court. This would give satisfaction to individuals and would prevent partiality. If, in actual practice, the provision should be

<sup>1</sup> Id., 530.

<sup>2</sup> Id., 532.

found improper, it could be altered. Perhaps, too, disputes between citizens of different States, a matter of no great importance, might be left to the State courts, but the administration of justice in some States had long been tardy and defective, and citizens of another State might not chance to get justice in a State court. Controversies between an American State and foreign States, Madison did not believe, could ever be decided in a federal court without the consent of the parties. If they consented, the provision for the trial was here made in the Constitution, and it was consonant to the law of nations that such disputes should be tried by a national tribunal. It should not be within the power of a State to drag the whole nation into war.<sup>1</sup>

But the chief defense and exposition of the judiciary were made by John Marshall. Judicial tribunals, such as would be appointed under the Constitution, he said, for the decision of controversies, did not exist under the Articles, and everyone must recognize the benefits to the country at large which must result from this. Mason and his followers had objected that the federal courts would not determine the causes which came before them with the same firmness and impartiality with which the State courts would decide, but Marshall refuted this charge, remarking that the federal judges would be equally competent with the State judges. Instead of being objectionable, as Mason had claimed, the appointment of an adequate number of inferior courts would be a great public convenience, and, as it seemed to Marshall, necessary to the protection of the system. There was nothing in the Constitution to show that the jurisdiction of the State courts was to be diminished; they were left

<sup>1</sup> Id., 533; June 20, 1788.

intact. No one had claimed that the government of the United States would have power to make laws on every subject. Congress could not go beyond its delegated powers, and a law unwarranted by any of the powers enumerated in the Constitution would be considered by the judges as an infringement of it, and would be declared void.

The objection that the federal judiciary would annihilate the State courts was sufficiently answered by the State dockets, which were so crowded with suits that the life of a man would not see them ended. Certainly the trial of some of these cases in other courts would neither be wrong nor leave the State courts without sufficient business. If the power was not given to the federal judiciary, the Constitution would not be protected from infringement.

Mason claimed that federal officers would find protection for their misdeeds in the federal courts, an objection which Marshall pronounced unreasonable. The discrimination between the cases of chancery, admiralty and common law, he said, could well be left to Congress. It would neither enlarge its powers nor endanger the public, and he remarked with characteristic insight: "Where power may be trusted, and there is no motive to abuse it, it seems to me to be as well to leave it undetermined as to fix it in the Constitution." To suppose that a sovereign State would be dragged before a federal court,<sup>1</sup> he said, was not rational. The intent of the judicial article, in this particular, was to enable States to recover claims of individuals residing in other States. The words, he

<sup>1</sup> This idea was at the basis of Justice Iredell's dissenting opinion in *Chisholm vs. Georgia*; 2 *Dallas*, 419; and also of the Eleventh Amendment; see the account of this amendment post, pp. 264-291.

said, warranted this construction. But it was said there would be partiality, if the suit could not be defended,—if an individual could not proceed to obtain judgment against a State though he might be sued by a State. This was necessary and could not be avoided. Marshall could see a difficulty in making a State defendant which did not prevent its being plaintiff. If an individual should have a just claim against any particular State, it was to be presumed that on application to its legislature he would obtain satisfaction.<sup>1</sup>

He conceded that the provision permitting citizens of one State to institute suits against those of another was not without objections, but they might be carried too far. The independence of the judges forbade any deviation from justice in the federal courts, and the provision might be necessary in cases arising in the regulation of commerce, and in cases of debt. The provision, as it stood, did not change the laws of evidence or the principles governing the control of cases, which would be determined by the laws of the State in which the contract was made; a principle well established in the jurisprudence of all the States. It was to preserve the peace of the Union that this jurisdiction had been given.<sup>2</sup> To Mason's objection to federal jurisdiction in controversies between a State and a foreign State, Marshall answered that as the previous consent of the parties was necessary, a trial in the federal court could not violate justice; and if the federal judiciary thought a claim against a commonwealth unjust, the foreign State would be barred. That the jurisdiction in equity and admiralty cases

<sup>1</sup> Id., 555-556. It was on this ground that the Eleventh Amendment was added to the Constitution in 1798; see an account of its adoption, post, pp. 264-291.

<sup>2</sup> Id., 557.

should extend both to law and fact coincided with the practice of the States. The Constitution empowered Congress to make whatever exceptions it might judge best as to law and fact in the appellate jurisdiction of the Supreme Court, and these exceptions would be determined by the interest and liberty of the people.<sup>1</sup>

Henry had likened the establishment of inferior federal tribunals, with jurisdiction over controversies between citizens of a State and foreign citizens, to a retrospective law.<sup>2</sup> Marshall answered that there was a difference between the creation of a tribunal to give justice and effect to an existing right, and the creation of a right that did not exist before. An individual is bound by his contracts, and the creation of a new court would not amount to a retrospective law. Both Mason and Henry had made much of the omission of a clause providing for a trial by jury; and both had cited the Constitution of Virginia as the proper model. Marshall answered that it was the Bill of Rights in the Virginia Constitution that directed trials to be by jury,<sup>3</sup> yet this was no security, for the Bill of Rights was not a part of the Constitution.<sup>4</sup> The proposed national Constitution did not exclude Congress from giving a trial by jury in civil cases, and in this respect was like the government of Virginia. The Virginia Legislature did not give a trial by jury where it was unnecessary, but wherever it was thought expedient; Congress would do the same, as it was founded on the same principle.<sup>5</sup>

Chancellor Wythe, who had not participated in the dis-

<sup>1</sup> Id., 560.

<sup>2</sup> Id., 539-541.

<sup>3</sup> Constitution, 1776; Bill of Rights, section eleven.

<sup>4</sup> Id., 561.

<sup>5</sup> Id., 561.

cession, and who, because of sickness in his family, had left the Federal Convention before the signing of the Constitution, was a firm supporter of it in Virginia, but now, after a careful comparison between it and the Articles, he admitted its imperfections and the propriety of some amendments. Experience would develop the plan and show where alterations were necessary. The critical situation of America and the extreme danger of dissolving the Union rendered it necessary, in his judgment, to adopt it first and amend it afterward. This could easily be done in the manner proposed by the Constitution, as amendments were desired by the States and had already been proposed by several. He then moved that the Constitution should be ratified, and whatsoever amendments might be necessary should be recommended to the consideration of the first Congress under the Constitution.<sup>1</sup>

Henry objected to this procedure, because it would admit that the new system was defective in the most essential particulars; therefore, its defects should first be remedied. All agreed that the Constitution was a compact, yet it was contrary to the experience of the whole world to enter into a compact and afterwards to settle its terms.<sup>2</sup> Henry's plan was to refer a Declaration of Rights, and amendments to the most exceptional parts of the Constitution, to the other States in the Confederacy for their consideration, previous to ratification;<sup>3</sup> and he submitted a Declaration and amendments which, with slight modification, were ultimately adopted.<sup>4</sup> As the prospect of ratification became brighter, Henry became

<sup>1</sup> Id., 587; June 24, 1788.

<sup>2</sup> Id., 591.

<sup>3</sup> Id., 593.

<sup>4</sup> Id., 657-661. The Declaration of Rights contained twenty articles and the amendments twenty also. As to the extent of their incorporation in the first ten amendments, see pp. 199-264.

more vehement and aggressive. He saw no danger of disunion among the States, but the Constitution would inevitably produce it. Both New York and North Carolina would never accede to the plan till it was amended, and a great part of Virginia, meaning Kentucky, was decidedly against it as it stood. Virginia had proposed the Convention at Annapolis and that of Philadelphia, but if she assented to the Constitution she would lose her pre-eminence; and he gave notice that he would have no hand in subsequent amendments. His language was so vehement that Randolph interpreted it as advocating secession unless previous amendments were adopted.<sup>1</sup>

As a last resort Henry attacked the clause limiting the slave trade, as proof that the Constitution gave Congress the power to abolish slavery and to provide for the enrollment of black men in the army.<sup>2</sup> While he deplored slavery he believed that prudence forbade its abolition. The general government ought not to set the negroes free, because the majority of the States were not in sympathy with emancipation,<sup>3</sup> but he clearly saw the political and social condition of the country when he observed that the majority of Congress would come from the North, while the slaves were in the South.<sup>4</sup>

The clause empowering Congress to prohibit the slave trade after 1808, he said, would jeopardize the property of the people of Virginia, and put it into the hands of

<sup>1</sup> Id., 597.

<sup>2</sup> Id., 590.

<sup>3</sup> For a history of the attitude of the States toward the negroes free and slave, see my *Constitutional History of the American People, 1776-1850*, I, Chapters vii and xii; and II, Index, "Negroes and Slavery."

<sup>4</sup> In 1790, there were seven free States and five slave-holding, and the House of Representatives consisted of thirty-five members from the free States and thirty from the slave.

those who were not situated like its people.<sup>1</sup> Randolph replied to Henry's objection to the restriction of the slave trade that the southern States, and even South Carolina herself, had conceived slave property to be secure by the words of this clause; and that not a member of the Virginia delegation to Philadelphia had entertained the smallest suspicion of the abolition of slavery. He challenged Henry to point out the clause where this formidable power of emancipation was inserted, and to make assurance doubly sure, he quoted the clause for the rendition of fugitive slaves as sufficient proof of the pro-slavery character of the Constitution.<sup>2</sup> But the voice of the future was heard as well as the voice of the past. Zachariah Johnson, from Augusta county, after briefly giving the reasons why he should support the Constitution, objected to Henry's Bill of Rights, that it did not acknowledge that all men by nature are equally free and independent. He had no sympathy with Henry's hostility to emancipation. The principles of emancipation, he said, had begun to work since the Revolution, and whatever the people of Virginia might do, emancipation would come at last. He looked upon slavery as the cause of the impiety and dissipation so widely disseminated among the American people; total abolition would do much good.<sup>3</sup>

The session had been protracted nearly four weeks, the delegates were becoming weary, and objectors to the new plan were merely repeating their objections. When all had been said the alternative remained; Union or no Union,<sup>4</sup> and the wavering members were beginning to believe that they would lose nothing and might gain much by sup-

<sup>1</sup> Elliot, III, 591.

<sup>2</sup> Id., 599.

<sup>3</sup> Id., 648.

<sup>4</sup> Washington to Randolph, January 8, 1788; Sparks IX, 297.



porting the new plan. Assured, now, that the navigation of the Mississippi was not to be surrendered, some of the Kentucky members became friendly to the new plan. Even such ardent Anti-Federalists as Richard Henry Lee and George Mason were not surpassed by Madison or Marshall in their opposition to paper money. Yet there were many members, and not all from the rural districts, who hesitated to vote for a government which would establish public credit and maintain the obligation of contracts. In the ardor of his innumerable objections, Henry said many things which should not be construed too strictly against him; thus, when he exclaimed that he might yet be called a rebel,<sup>1</sup> but that his neighbors would protect him. This was interpreted rather as exuberance in speech than a serious declaration, for Henry's last words in the discussion were that if he should be in the minority, he would have the painful sensations arising from the conviction of being overpowered in a good cause; he would yet be a peaceful citizen, and, deprecating violence, should devote himself to remedy the defects of the system in a constitutional way.<sup>2</sup>

It was now the twenty-fifth of June and the convention after a more intense debate than had been heard in any other Commonwealth, took up the amendments which Henry and his friends had proposed. And first, by a majority of eight votes, it decided that these amendments should not be previous, but subsequent, to ratification.<sup>3</sup> This meant that Virginia ratified unconditionally, unless its action be construed as implying that Congress would propose these amendments to the States. By a vote of eighty-nine to seventy-nine, the Constitution was ratified

<sup>1</sup> Id., 546.

<sup>2</sup> Id., 652.

<sup>3</sup> Id., 653.

and the amendments and a Bill of Rights adopted.<sup>1</sup> The engrossed form of ratification and the amendments reported by the committee, of which Wythe was chairman, were formally agreed to on the twenty-seventh, and the convention adjourned.<sup>2</sup>

The distribution of the vote showed the state of public sentiment from the tide-water counties to the banks of the Mississippi. The central counties, and those bordering North Carolina, and nearly all the counties in Kentucky, voted against the Constitution. Its friends were in the eastern, northern and northwestern part of the Commonwealth. The form of ratification contained a statement which may be considered as the foundation of that important political doctrine which Madison defended, ten years later, and which has long been known as the doctrine of '98.

Virginia ratified with the understanding that the powers granted under the Constitution were derived from the people of the United States and might be resumed by them whenever they should be perverted to their injury and oppression; and that every power, not granted, remained with the people at their will.<sup>3</sup> The majority for the Constitution was a narrow one and was not secured without great tact, patience and argument.

"I think," said Grayson, "that were it not for one great

<sup>1</sup> The extent to which the Virginia amendments were finally incorporated in the Constitution is shown in the history of the first twelve; see pp. 199-333.

<sup>2</sup> For the amendments and Bill of Rights see Elliot, III, 657-661; also the formal ratification in Documentary History, III, 145-160.

<sup>3</sup> For an account of the doctrine of 1798, see my Constitutional History of the American People, 1776-1850, I, Chapter vi. The language of this clause in the Virginia act of ratification is almost identical with the Tenth Amendment of the Constitution.

character in America, so many men would not be for this government; we have a ray of hope. We do not fear while he lives, but we can only expect his fame to be immortal. We wish to know who beside him can concentrate the confidence and affections of all America.”<sup>1</sup> Had Washington not been one of the authors of the Constitution; the first citizen of Virginia and outspoken in favor of the new plan,—there is little doubt that it would have been rejected by the Richmond convention.<sup>2</sup> While Virginia was taking action, on the Constitution, the people of New York had assembled in convention to consider it.

<sup>1</sup> Elliot, III, 616.

<sup>2</sup> The evidence is abundant that common expectation pointed to Washington as the first President. It was hinted at by Doctor Franklin in the Federal Convention on the 4th of June; (Elliot, V. 154) see also Henry Lee's letter to Washington, September 13, 1788, when Congress had made provision for the inauguration of the new government; Sparks, IX, 552.

## CHAPTER IV.

### RATIFICATION BY NEW YORK.

The news of the ratification at Richmond was quickly dispatched to Mount Vernon, and Baltimore, and on to Poughkeepsie, where the New York convention was in session. Washington could not conceal his satisfaction.<sup>1</sup> He wrote to Pinckney that the citizens of Alexandria, who were Federal to a man, had no sooner received the news on the twenty-seventh of June, than they determined to devote the following day to festivity, but their joy was greatly increased and a much keener zest was given to their celebration by the arrival of the express, two hours before the dawn of day, with the news that, on the twenty-first, the convention of New Hampshire had acceded to the new confederacy by a majority of eleven voices.<sup>2</sup>

The citizens of Alexandria constituted the first public company in America who had the pleasure of pouring a libation to the prosperity of the ten States which had actually adopted the general government. The day was memorable as the anniversary of the battles of Monmouth and Sullivan's Island. Washington thought that the pleasing hope might now be rationally indulged that the

<sup>1</sup> Washington to Charles C. Pinckney, June 28, 1788; Sparks, IX, 389.

<sup>2</sup> It does not appear that the ratification by New Hampshire was known in the Virginia convention before it also had ratified; James Innes on the 25th, (Elliott, III, 636) speaks of eight States having exercised their sovereignty in ratification, a remark which he would not have been likely to make if the news from New Hampshire had been received. Innes was speaking just before the vote was taken in the Virginia convention on ratification.

Union was to be established upon a durable basis. But the news from North Carolina was not assuring, and there was much doubt of the final decision of New York. The whole question in debate had shifted from policy to expediency. The decision of ten States could not be without effect. Perhaps in this crisis the wisest way was to adjourn the New York convention until the people, in some parts of the State, could more coolly and deliberately consider the magnitude of the question and the consequences it involved. When New York had acted, only one little State would remain; and he concluded his letter with the observation that it was universally believed that the scales were ready to drop from the eyes, and the infatuation be removed from the heart, of Rhode Island.

The news from Virginia, coming so swiftly after that from New Hampshire, elated the Federalists, as it spread over the land, and the people of Philadelphia, the birth-place of the Constitution, now assured that the new plan was safe, and that the leading State in the Union had approved it, determined to celebrate the event in an appropriate manner. The city had learned of the decision of the Concord convention on the twenty-sixth of June, and letters from Richmond, telling the news, were received late in the afternoon of the second of July. Naturally the Federalist leaders bethought themselves of the opportunity which the annual celebration of independence two days later, would afford them of making the occasion one of national rejoicing. The festivities were immediately planned, and chiefly by Francis Hopkinson.<sup>1</sup> All the companies of mechanics and tradesmen were

<sup>1</sup> He was chairman of the program committee; see the *Pennsylvania Packet*, July 4, 1788, and a description of the celebration in the *Packet* of July 9. Hopkinson's Ode and Wilson's address are given in the *Packet*, of the 10th.

speedily invited to participate in a grand procession. The ten States which had ratified were to be represented by ten ships anchored in the Delaware, each flying the name of a commonwealth.

The day was opened with a national salute. Early in the morning the procession started. Such a multitude of figures and floats in line had never before been seen in the city. On one car, a printing press was operated from which copies of a song in honor of the trades, written by Franklin, were struck off as the car rolled along, and were scattered among the people.<sup>1</sup> Hopkinson wrote an ode for the occasion which was translated into German and copies were freely distributed. The procession moved at last to the grounds in front of Bush Hill, where James Wilson delivered an address. Every trade practiced in the flourishing city was represented in the line, but the delight with which the multitude recognized the miniature shops in which the craftsmen were busy at their toil rose to its height when the imposing allegorical figures rolled past representing the great historical events of recent years. Here were the Signing of the Declaration; the Alliance with France; the Treaty with Great Britain, and the gathering of the States to make the Constitution; but most conspicuous of all was the display of the Carpenter's Company,—now in its sixty-fourth year,—a large square banner of white silk, showing devices symbolical of the carpenter trade, and a Federal edifice drawn by six horses. It was a temple of dazzling white, circular in form and more than twenty feet high. Its

<sup>1</sup> One of the verses ran as follows:

And Carders, Spinner and Weavers attend;  
And take the advice of Poor Richard, your friend,  
Stick close to your looms, your wheels and your card,  
And you never need fear of the times being hard.

dome, surmounted by a statue of Ceres, was supported by ten fluted columns, each representing a State in the new Union. Three other columns, just outside the temple, were waiting to be placed on their pedestals. Inscribed on the temple the delighted spectators read: "In Union the Fabric Stands Firm." Their joy could scarcely have been greater had they known that the beautiful temple before them was again to be the most conspicuous object in a grander parade, viewed by more than a million souls, a hundred years later, when the first century of the Constitution was celebrated.

Even the most sanguine Federalist would have found difficulty in believing that in the wonderful commemoration in 1887, the Union, which he knew, so feeble in its beginnings, would be symbolized by a Doric temple with thirty-eight columns, each representing a State, and that eight unfinished columns representing Territories should be awaiting their places on pedestals for new States.<sup>1</sup> The spectator who saw the two temples in the imposing display in 1887, had he chosen to read the address which James Wilson gave at the first anniversary, a hundred years before, would have found no feeble prophecy of the progress and prosperity which the nation should enjoy during the first century of its existence under the Constitution.

When the news from Richmond reached Poughkeepsie, on the third of July, the New York convention had been in session two weeks and a half. It had organized on the seventeenth of June with sixty-five members. George Clinton, of Ulster county, the Governor of the State, had been unanimously chosen its President. Hamilton,

<sup>1</sup> A picture of the temples of 1788 and 1887, as they appeared in the procession at the one hundredth anniversary, is given in Carson, II, 24.

Yates and Lansing from Albany, lately delegates to the Federal Convention, were members, and among others of eminence were John Jay, the Secretary of Foreign Affairs; the Chancellor of the State, Robert R. Livingston; Melancton Smith of Dutchess county; James Duane, John Sloss Hobart, who came up with Jay, Livingston and Hamilton from the city and county of New York, and Samuel Jones, an eminent lawyer and a delegate from the county of Queen. It was expected, and expectation was realized, that there would be considerable opposition to the Constitution in New York.<sup>1</sup>

So uncertain was the sentiment of its people, the action of earlier conventions was observed with great anxiety by the Federalists in the State. Rejection by Massachusetts would invigorate the opposition in New York,<sup>2</sup> as would postponement in New Hampshire;<sup>3</sup> forebodings which the elections in New York<sup>4</sup> fully justified, for it was soon known that the majority of the members chosen were Anti-Federalists.<sup>5</sup> By the State constitution of 1777, an elector was required, in addition to the qualification of residence, to possess a free-hold of the value of twenty pounds, or to be a taxpayer, for a tenement of the yearly value of forty shillings; but the legislature, in the act calling the convention had ignored the constitution and empowered all the free male citizens of the State, of the age of twenty-one and over, both to vote and to be eligible as delegates.<sup>6</sup> Though opposition was so

<sup>1</sup> Washington to Jefferson, January 1, 1788; Sparks, IX, 293.

<sup>2</sup> Washington to Madison, February 5, 1788; Id., 312.

<sup>3</sup> Washington to Knox, March 30, 1788; Id., 340.

<sup>4</sup> April 24-30, 1788.

<sup>5</sup> Hamilton's Works, I, 454. John Jay to Washington, May 29, 1788 and Washington to Jay, June 8, 1788; Sparks, IX, 372.

<sup>6</sup> The same extension of the suffrage was permitted by the act of April 6, 1801, in the election in which the adoption of consti-



strong and outspoken, the Federalists, especially those outside of the State, believed that the leaders of the opposition in New York would consider well the consequences, before they rejected the Constitution.<sup>1</sup>

The prevailing anti-federalism of New York was in large measure due to its form of local government, which made the county and not the town the unit of political action; in this respect the State was like Pennsylvania and Virginia; and consequently its public sentiment was largely dictated by party leaders. Had the town-meeting existed in New York, as in New England, the struggle for ratification would have been not unlike that in Connecticut. New York at this time but slightly resembled the Empire State as we know it. Save in the Hudson valley, and for a short distance in the Mohawk, it was scarcely inhabited by whites. The city of New York was a strong federal citadel, but to the northward, federalism soon vanished. Ratification, if secured at all, would be the result of phenomenal political management on the part of the Federalists, and would be carried by a small vote.<sup>2</sup>

But the struggle for ratification had begun long before the meeting of the Poughkeepsie convention and before the legislature had passed the resolution<sup>3</sup> under which delegates had been elected. The struggle began nearly ten months before, immediately upon the adjournment of the Federal Convention, when Federalists and Anti-

tutional amendments of that year were the issue. It will be noticed that the act allowed free persons of color to vote, without discrimination.

<sup>1</sup> Washington to Benjamin Lincoln, June 29, 1788; *Id.*, 392.

<sup>2</sup> The summary of the distribution of the Federal and the anti-Federal opinions among the counties of New York may be found in Libby, 80-82.

<sup>3</sup> February 1, 1788.

Federalists had rushed into print and also began their campaign of almost unbridled speech. On the federal side there appeared in the New York Independent Journal, a few days after the adjournment of the Federal Convention, an article signed *Publius*, which was soon followed by others in the same paper and in the Packet and the Daily Advertiser.

Now the pseudonym *Publius*, it was soon known, was the name not of one person, but of three, and the three were Madison, Jay and Hamilton. The plan was Hamilton's, and the articles, at first intended to extend no more than in twenty or twenty-five numbers, were addressed to the people of the State of New York. There were some Anti-Federal writers, who wished to see the Union divided into several confederacies.<sup>1</sup> The early numbers of the Federalist, for by that name the articles under the signature of *Publius* were soon designated, pointed out the danger of this and answered Anti-Federal objections to the new plan. The early numbers, in newspaper form, were sent to Washington, and, at his instigation, were reprinted in Virginia.<sup>2</sup> Federalists everywhere agreed with him that they gave the rights of man a full and fair discussion and explained them in a clear and forcible manner such as could not fail to make a lasting impression upon those who read them.<sup>3</sup>

The interest which the papers excited and the magnitude of the question at issue, caused their authors to modify their plans. In order to influence the people of other States as well, the earlier essays to the number of thirty-

<sup>1</sup> The most important Anti-Federal pamphlets by Melancton Smith and Richard Henry Lee are reprinted in Ford's Pamphlets.

<sup>2</sup> Washington to David Stuart, November 30, 1787; Sparks, IX, 283; to James Madison, December 7, 1787; Id., 285.

<sup>3</sup> Washington to John Armstrong, April 25, 1788; Id., 352.

six were reprinted with a preface and table of contents written by Hamilton and dated the seventeenth of March, 1788.<sup>1</sup> He thought that the Federalist might not be without effect in assisting the public judgment on the momentous question of the Constitution. The desire to throw full light upon the subject had led and in a great measure, unavoidably, to a more copious discussion than was at first intended. Thus it happened that the first volume of the Federalist was published before all the remaining essays were written. The fortieth number appeared in the New York Packet on the eighteenth of January, and the seventieth, on the eighteenth of March, the day after the appearance of the first volume. The last number to appear, in newspaper form, was the seventy-seventh, in the Packet for the fourth of April. The remaining eight numbers first appeared in book form in the second volume,<sup>2</sup> which was published on the twenty-eighth of May, 1788.

It does not appear that the public recognized the Federalist as anything more than a passing party pamphlet, but its true character was clearly discerned by a few, and by none more accurately than Washington, who wrote to Hamilton his judgment of the work, saying that when the transient circumstances and fugitive performance which attended the crisis of the adoption of the Constitution had disappeared, the Federalist would merit the notice of posterity, because it candidly and ably discussed

<sup>1</sup> The Federalist, a Collection of Essays Written in Favor of the new Constitution as Agreed upon by the Federal Convention, September 17, 1787, in two volumes; I, New York, Printed and Sold by J. and A. McLean, No. 41 Hanover Square, MDCCLXXXVIII, 227.

<sup>2</sup> Its title page is like that of the first volume and the book contains the new Constitution, the resolution of the Convention, and Washington's circular letter; 384 pp.

the principles of freedom and the topics given; "which will be always interesting to mankind so long as they shall be connected in civil society."<sup>1</sup>

In the New York convention Chancellor Livingston opened the discussion with an examination of the Confederation, pointing out its defects and the superiority of the proposed plan. Under it, New York would have greater prosperity; the Union would be capable of self-defense, and the dangers incident to its situation would be practically removed.<sup>2</sup> It was agreed, as it had been in Virginia, that the vote should not be taken until the Constitution had been considered clause by clause, and that amendments, if any, should be made in accordance with the same rule. Lansing, who, it will be remembered, together with his colleague, Yates, had left the Federal Convention early in July, under the excuse that it was exceeding its powers, replied to Livingston, in a general support of the Articles, and declared that a consolidated government, such as was proposed, was not adapted to so extensive a territory as the United States and could not preserve the rights or liberties of its people.<sup>3</sup>

Melanchton Smith, the ablest Anti-Federalist in the convention, was devoted to a government strictly on a federal plan, which he thought the Constitution would violate. Thus he complained that its rule of apportionment of representation was inadequate and unjust, because it failed to fix the minimum membership of the House of Representatives. Particularly did he object to the inclusion of three-fifths of the slaves. It would be impossible for representatives chosen on the basis proposed to possess the requisite information, therefore he

<sup>1</sup> Washington to Hamilton, August 28, 1788; Sparks, IX, 420.

<sup>2</sup> Elliot, II, 208-216; June 19, 1788.

<sup>3</sup> Id., 216-221; June 20, 1788.

proposed that the apportionment should be changed to one for every twenty thousand inhabitants.<sup>1</sup> Hamilton entered extensively into the history of confederacies and showed that they were all organized on fatal principles. Weakness in the head had produced resistance in the members. The defects of the Confederation had not been realized until after the peace, though the opponents of the Constitution insisted that it was the Articles which had brought the country through the war. He defended the rule of apportionment and the basis of representation, as more liberal than that under the Articles, and as adapted to the growth of the country. Vermont, Kentucky and Frankland would soon become independent; new members of the Union would be formed in the West which must be represented, and the membership of the Federal legislature would steadily increase. The State governments would forever preclude the possibility of federal encroachments; and the anti-federal claim that the liberties of the States could be subverted by the federal head was repugnant, he said, to every rule of political calculation.<sup>2</sup> "All governments, even the most despotic, depend in a great degree on opinion," and, said he, as the will of the people constitute the essential principle of the new government their interests could not be other than safe.<sup>3</sup>

Smith, and the Anti-Federalists generally, insisted that in order to gain the confidence of the people there must be a numerous representation. "The true touch-stone," replied Hamilton, "is a good administration."<sup>4</sup> This, indeed, would be the supreme test of the new plan, and it was one which Hamilton had elaborated in the Fed-

<sup>1</sup> Id., 226-229.

<sup>2</sup> Id., 230-239.

<sup>3</sup> Id., 252.

<sup>4</sup> Id., 254.

eralist. Therefore, the value of the plan would depend entirely upon its practical organization, and he suggested that the requisite information, which was demanded of the representative, would be secured by dividing the States into districts and the representative chosen from the district would probably possess all the knowledge desired.<sup>1</sup>

But Smith replied that the only way to remove faults in the Constitution was to increase the representation and limit the powers of the government,—the major premise of all his later arguments.<sup>2</sup> Hamilton, however, did not argue wholly on the defensive, but pointed out the incurable evils of the Confederation, one radical and dangerous defect of which was the necessity of the concurrence of nine States to pass the most important measures.<sup>3</sup> This would be removed by the Constitution. Clinton advanced the argument used by Anti-Federalists in other States that the interests, habits and manners of the thirteen States were too diverse to permit a general and free government over them.<sup>4</sup> To which Hamilton replied, that from New Hampshire to Georgia the people of America were as uniform in their interests and manners as those of any in Europe, and that they could not form an impediment to the regular operation of those general powers which the Constitution would give to the Union.<sup>5</sup> In-

<sup>1</sup> Id., 255. Compare the New York act of apportionment of March 4, 1796, by which the State was divided into four great districts for the purpose of local government; also the act of April 12, 1792, dividing the State into four districts for the choice of presidential electors; the act of April 3, 1801, apportioning representation under the amended Constitution, all of which carried out Hamilton's principle.

<sup>2</sup> Id., 259.

<sup>3</sup> Id., 264.

<sup>4</sup> Id., 262.

<sup>5</sup> Id., 267.

proposed that the apportionment should be changed to one for every twenty thousand inhabitants.<sup>1</sup> Hamilton entered extensively into the history of confederacies and showed that they were all organized on fatal principles. Weakness in the head had produced resistance in the members. The defects of the Confederation had not been realized until after the peace, though the opponents of the Constitution insisted that it was the Articles which had brought the country through the war. He defended the rule of apportionment and the basis of representation, as more liberal than that under the Articles, and as adapted to the growth of the country. Vermont, Kentucky and Frankland would soon become independent; new members of the Union would be formed in the West which must be represented, and the membership of the Federal legislature would steadily increase. The State governments would forever preclude the possibility of federal encroachments; and the anti-federal claim that the liberties of the States could be subverted by the federal head was repugnant, he said, to every rule of political calculation.<sup>2</sup> "All governments, even the most despotic, depend in a great degree on opinion," and, said he, as the will of the people constitute the essential principle of the new government their interests could not be other than safe.<sup>3</sup>

Smith, and the Anti-Federalists generally, insisted that in order to gain the confidence of the people there must be a numerous representation. "The true touch-stone," replied Hamilton, "is a good administration."<sup>4</sup> This, indeed, would be the supreme test of the new plan, and it was one which Hamilton had elaborated in the Fed-

<sup>1</sup> Id., 226-229.

<sup>2</sup> Id., 230-239.

<sup>3</sup> Id., 252.

<sup>4</sup> Id., 254.

eralist. Therefore, the value of the plan would depend entirely upon its practical organization, and he suggested that the requisite information, which was demanded of the representative, would be secured by dividing the States into districts and the representative chosen from the district would probably possess all the knowledge desired.<sup>1</sup>

But Smith replied that the only way to remove faults in the Constitution was to increase the representation and limit the powers of the government,—the major premise of all his later arguments.<sup>2</sup> Hamilton, however, did not argue wholly on the defensive, but pointed out the incurable evils of the Confederation, one radical and dangerous defect of which was the necessity of the concurrence of nine States to pass the most important measures.<sup>3</sup> This would be removed by the Constitution. Clinton advanced the argument used by Anti-Federalists in other States that the interests, habits and manners of the thirteen States were too diverse to permit a general and free government over them.<sup>4</sup> To which Hamilton replied, that from New Hampshire to Georgia the people of America were as uniform in their interests and manners as those of any in Europe, and that they could not form an impediment to the regular operation of those general powers which the Constitution would give to the Union.<sup>5</sup> In-

<sup>1</sup> Id., 255. Compare the New York act of apportionment of March 4, 1796, by which the State was divided into four great districts for the purpose of local government; also the act of April 12, 1792, dividing the State into four districts for the choice of presidential electors; the act of April 3, 1801, apportioning representation under the amended Constitution, all of which carried out Hamilton's principle.

<sup>2</sup> Id., 259.

<sup>3</sup> Id., 264.

<sup>4</sup> Id., 262.

<sup>5</sup> Id., 267.



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<sup>3</sup> Id., 264.

<sup>4</sup> Id., 262.

<sup>5</sup> Id., 267.

deed, if Clinton's argument was to be pursued to the end, Hamilton remarked, it would lead to the withdrawal of all confidence of the American people in any government.<sup>1</sup>

Lansing, making much of his knowledge of the proceedings in the Federal Convention, renewed the discussion pending when he had left it, on the danger which the small States would incur from the large in the extended representation; but Lansing having left before the basis of representation was agreed to, was ill qualified to explain the motives of the Convention. Hamilton remarking that Lansing and himself saw the facts substantially alike, observed that the "plan in all its parts was a plan of accommodation,"<sup>2</sup> a fact of great weight with thoughtful men and used to its full effect by the supporters of the Constitution in all the States. Even the most aggressive Anti-Federalist hesitated to set up his individual judgment against the consensus of opinion embodied in the plan. But Lansing could not understand how, if it was a system of accommodation, that the number as the basis of representation had been reduced from forty thousand to thirty thousand. This gave Hamilton an opportunity to make the effective reply that the change had not been made till the Convention was near rising and the business completed, when Washington, expressing the wish that the number should be reduced to thirty thousand, it had been agreed to without opposition.<sup>3</sup>

Smith did not see in the Articles of the Confederation the opportunities for corruption, incident to the required vote of nine States in important matters, of which Hamilton had made so much. He thought that the power of

<sup>1</sup> Id., 268.

<sup>2</sup> Id., 274.

<sup>3</sup> Id., 274.

recalling the members of Congress and their annual election was an adequate check against corruption.<sup>1</sup> It was in consonance with this idea that Gilbert Livingston, of Dutchess county, proposed, as an amendment, that a senator should not be eligible for more than six years in twelve, and that a State might recall him at any time and appoint another in his stead.<sup>2</sup> Chancellor Livingston promptly pointed out that this would subordinate the Senate to factions in the States and prove a source of endless confusion. While the Senate was intended to represent the State governments, its members were also representatives of the United States, and were not to consult the interest of any one State, but that of the Union. This could never be done if there was a power to recall. It would open a wide door for bribery, factions and intrigue.<sup>3</sup> But Livingston's proposition was defended with warmth by Lansing.<sup>4</sup>

This attack on the organization of the Senate called forth from Hamilton one of the most remarkable speeches of the times and the most complete exposition and defense of the Senate to be found in literature outside of the *Federalist*. He defended the provision in the Constitution, respecting the Senate, as being based on the principle of strength and stability in the organization of government and on the necessity for vigor in its operation.<sup>5</sup> With equal effect, he met Smith's objections to the new plan by showing that it comported fully with the two great requisites in a government, the safety of the people

<sup>1</sup> Id., 281.

<sup>2</sup> Id., 289.

<sup>3</sup> Id., 291.

<sup>4</sup> Id., 293-296.

<sup>5</sup> Id., 300-307; June 24, 1788. Compare the *Federalist*, Nos. LXII-LXV; for the authorship of this, see the introduction, by Lodge, to his edition of the *Federalist*.

and the energy of the administration.<sup>1</sup> In no other convention was there such persistent and prolonged objection made to the Senate, and chiefly, to its powers as too formidable.

The news of ratification by New Hampshire reached the convention on the twenty-fourth of June, which caused Chancellor Livingston to observe that it greatly altered the circumstances of the country and changed the ground of the debate. The Confederation was now dissolved and the question had become one of policy and expediency. Some might flatter themselves that there were southern States, referring to Virginia and North Carolina, that would form a league with New York, but such a confederation would expose the State to great dangers. Both Smith and Lansing claimed to take an entirely different view of the intelligence from New Hampshire. True nine States had ratified, but Lansing contended that it ought not to influence the deliberations of New York. If, said he, a disunion should unfortunately take place, New York was not in so bad a situation that it could not provide for its own safety independently of the other States. But he pronounced the assertion utterly false that he, or any opposed to the new plan, wished for a dissolution of the Union.<sup>2</sup>

Much objection was made to the clause giving Congress power to regulate elections, and Samuel Jones of Queens proposed as an amendment that this power should not be exercised unless a State refused to make the necessary laws, or should be incapable of making them,<sup>3</sup> to which Melancton Smith added that each State should be dis-

<sup>1</sup> Id., 316; June 25,

<sup>2</sup> Id., 324-325. See Jay's letter to Washington and his reply, July 18, 1788; Sparks, IX, 393.

<sup>3</sup> Id., 325.

tricted in accordance with the number of its representatives and that each representative should be chosen by a majority of votes. He defended his amendment on the ground that as the Constitution stood, an entire State might be a single district and its representatives be chosen on a general ticket.<sup>1</sup> Smith feared that otherwise a representative might be elected who had not received a majority of the votes cast.<sup>2</sup> John Williams, of Washington county, though without knowledge of the amendments which had been proposed in South Carolina, now offered the substance of one of them, forbidding Congress to levy excises on domestic manufactures, or to lay direct taxes until the States should have paid their proportionate requisitions.<sup>3</sup>

Not one provision in the article on the powers of Congress pleased the anti-federal members, who construed them as trespassing on the rights and powers of the States. These, as Smith said, should make laws for local purposes; but the general government, only for national purposes. He interpreted the powers granted to Congress as transcending the scope and object of the general government.<sup>4</sup> The whole tendency of this part of the plan, he said, was to abolish the State constitutions. Williams pronounced the terms, "common defense and general welfare," to be indefinable, and that against the encroachments which they made possible, the State governments would have no protection.<sup>5</sup> The purpose of

<sup>1</sup> It is not improbable that the precedent in Smith's mind was the provision in the Constitution of New York (1777, Article XII) by which the counties of the State were divided into four great districts for the purpose of electing senators.

<sup>2</sup> Smith's amendment was revised and put in a modified form by Lansing; Elliot, II, 329.

<sup>3</sup> Id., 331.

<sup>4</sup> Id., 332; June 27, 1788.

<sup>5</sup> Id., 338.

the amendment was to prevent the over taxation of our infant manufactures.

Livingston, objecting to the amendment, urged that it would prove only a temporary expedient, for at a future day an enlarged population would render us a manufacturing people. The impositions would then necessarily lessen, and the public wants would call for new sources of revenue. Articles of luxury would be among the first subjects of excise, because they would be very productive and a charge on them would be favorable to the morals of the citizens. It would not do to impose upon the Union all the burdens, and divest it of the principal resources, of government. The amendment would in time deprive the United States of a fruitful and indispensable branch of revenue. The country had had sufficient experience with the impolicy of requisitions to forbid establishing a general government on them as the basis of its supplies.<sup>1</sup>

Hamilton, going to the heart of the matter, observed that the leading objects of the federal government, in which revenue was concerned, were to maintain domestic peace and provide for the common defense. In these were comprehended the regulation of commerce,—that is the whole system of foreign intercourse,—the support of armies and navies, and of the civil administration. The Constitution, he said, could not set the bounds to a nation's wants, and "it ought not, therefore, to set bounds to its resources."<sup>2</sup> The State governments would never become insignificant, so long as they retained the independent power of raising money. They could never lose their powers till the whole people of America were robbed of their liberties. "These must go together; they must sup-

<sup>1</sup> Id., 341-342.

<sup>2</sup> Id., 350-351.

port each other or meet one common fate." And he pronounced "as false and fallacious beyond conception" the major premise of all Anti-Federalist argument that though the State governments could be trusted and could not be restricted, yet the people could not confide in a national government, though they would have an effectual constitutional guard against every encroachment.<sup>1</sup>

In order to weaken the argument of the Anti-Federalists, and to prove that the State of New York had greatly suffered from the mode of raising revenues by requisitions, Hamilton planned to bring before the convention a mass of evidence embodied in resolutions of its legislature and in messages of Governor Clinton from 1780 to 1782, bearing on the distresses of the State and the defects of the Confederation.<sup>2</sup> He succeeded in getting these before the convention, despite the protests of Clinton and the Anti-Federalists, and presented their contents as indisputable proof that the State had been on the verge of destruction for want of an energetic government. Whether the convention accepted the inference which Hamilton drew from these papers may be doubted. Because the State might have suffered for a time under a system of requisitions, the opponents of the new plan were not ready to believe that it might not suffer more under a general government, which as Lansing claimed, possessed unlimited powers of taxation.<sup>3</sup> No argument advanced in favor of the Constitution seemed to have the slightest effect on Clinton, whose political ideal was a federal government founded on the States and subject to their will. No opponent of the Constitution, in any convention, more ardently defended State sovereignty.

<sup>1</sup> Id., 355.

<sup>2</sup> Elliot, II, 356.

<sup>3</sup> Id., 371-376.



While the Convention was in the midst of these acrimonious discussions, intelligence arrived on the third of July of ratification by Virginia without conditions, and it had a different effect from the recent news from New Hampshire. With all their opposition to the Constitution, the Anti-Federalists, in the New York convention, were not disposed to isolate the State from the Union; neither were they disposed to abandon their objections to the new government. After discussing at great length the amendments which they thought essential, the convention, on the tenth, was in a mood for compromise, and Lansing offered a Bill of Rights, which met with no objection, and a Committee of Accommodation was appointed consisting of seven members of each party with John Jay as chairman. To this committee were given Lansing's amendments, which were a new arrangement of all that had been offered, though with material alterations. He divided his amendments into three classes,—explanatory, conditional and recommendatory.<sup>1</sup> The conditional provided that there should be no standing army in time of peace without the consent of two-thirds of both branches of Congress; that there should be no direct taxes, nor excises on American manufactures; that the militia should not be ordered out of a State, except with the previous consent of its executive, nor for more than six weeks without the consent of its legislature; and that Congress should not interfere in elections unless a State refused or neglected to provide for them. When these came up in committee, Jay insisted on striking out the provision that they should be conditional, but the Anti-Federal members would not yield, and the committee broke up without effecting anything. The Federalist

<sup>1</sup> *Pennsylvania Packet*, July 18, 1788; *Elliot*, II, 410.

members remarked, however, that Samuel Jones and Melancton Smith showed signs of moderating their hostility to the Constitution.<sup>1</sup>

On the following day Jay brought forward the question of ratification without conditions, but that such parts of the Constitution as might be thought doubtful ought to be explained and such amendments as might be deemed expedient ought to be recommended. He was supported by Chancellor Livingston, and Morris, the Chief Justice, but Smith, Lansing and Clinton spoke with great ardor for the conditions. The debate on Jay's motion continued till the fifteenth, when Smith moved a conditional form of ratification, embodying the four conditions which Lansing had imposed and the calling of a second Federal Convention.<sup>2</sup> The Anti-Federalists had it in their power to adjourn the convention, but a motion to this effect, on the sixteenth, was rejected, and a motion by Hamilton to ratify in the manner observed by Virginia was rejected by a vote of more than two to one.<sup>3</sup> But Hamilton's defense of his motion was so effective that Smith announced that he should withdraw much of his opposition to the new plan; but still entertained objections which he thought were insuperable, namely, that the Constitution granted too great powers to Congress; provided for too few representatives; confused the function of government with the departments which it established, and, especially, granted too extensive powers to the judiciary; therefore, New York should reserve the right to withdraw from the Union, if the Constitution was not amended within a fixed time. A circular letter<sup>4</sup> should

<sup>1</sup> *Pennsylvania Packet*, Id.

<sup>2</sup> *Elliot*, II, 411.

<sup>3</sup> 41 to 20; *Pennsylvania Packet*, July 24.

<sup>4</sup> Known as the New York Letter, and the Clinton Letter.

be sent out to the States, that they request Congress to call a new convention for the purpose of taking up amendments. The prospect of conditional ratification was threatening, yet the Federalists were extremely anxious to ratify at almost any price.

On the nineteenth, Lansing brought forward his plan of conditional ratification, with a Bill of Rights prefixed, and amendments subjoined. Hamilton, in doubt, hastily wrote to Madison, then in Congress in New York city, requesting an opinion, which he read to the House, two days later: the reservation of a right to withdraw, if amendments in the form of the Constitution were not decided on within a certain time, said Madison, would be a conditional ratification. It would not make New York a part of the new Union, and would be rejected by Congress. The Constitution must be adopted as a whole and forever, as it had been adopted by the other States. The idea of conditional ratification had emanated from Richmond,<sup>1</sup> where, after careful consideration, it had been abandoned as worse than a rejection.<sup>2</sup>

On the twenty-third, Jones and Melancton Smith proposed that the words "in full confidence" should be substituted for "on condition" in the act of ratification, which was carried by a majority of three.<sup>3</sup> The rejection of Lansing's motion and the acceptance of that proposed by Jones and Melancton Smith were due to two principal causes. Smith and his Anti-Federalist colleague

<sup>1</sup> See page 94, *ante*.

<sup>2</sup> Hamilton's Works, I, 465.

<sup>3</sup> Elliot, II, 412; Pennsylvania Packet of July 30, 1788. This was a test vote. The federal votes came from New York city, Kings, Richmond, Westchester, Queens, Suffolk (4), Dutchess (3) and Washington; the anti-federal vote from Ulster, Orange, Columbia, Montgomery, Dutchess (1), Albany, Suffolk (1), Queens (1), Washington (3).

had changed their opinions and now believed that there was no alternative between acceptance and rejection;<sup>1</sup> and the Federalists agreed that a circular letter should go out to the States, recommending a second general convention. Consent to the letter was unanimous.

The vote, on the twenty-sixth, for ratification, with a Bill of Rights in twenty-four clauses, and thirty-two amendments, was carried by thirty yeas to twenty-one nays.<sup>2</sup>

The final conclusion of New York, though surprising, was not unexpected. It hardly seemed possible that, after ten States had adopted the Constitution, New York would withdraw from the Union; yet, considering the hostile majority which clung together in its convention, and the decided temper of the Anti-Federalist leaders, such a disaster seemed hardly avoidable. Its prevention was largely due to the arduous and meritorious efforts of Hamilton and Jay.<sup>3</sup> But no small praise was due to Melancton Smith and Samuel Jones, who, surrendering prejudice to reason, withdrew their opposition to the Constitution, and, by voting for it, made its ratification possible. The circular letter was the price of ratification and its tendency was far from satisfactory, for it implied many obstacles to the new system.<sup>4</sup> Madison promptly pronounced its tendency pestilential. He feared that if a second convention could not be put off, the new government might be at least successfully undermined by

<sup>1</sup> *Pennsylvania Packet*, July 30, 1788.

<sup>2</sup> For these amendments and the Bill, see Elliot, I, 327-331; the circular letter in Elliot, II, 413. The extent to which the New York amendments were incorporated in the Constitution later is shown in pp. 201-211. *Pennsylvania Packet*, August 4, 1788; *Documentary History*, III, 174.

<sup>3</sup> Washington to John Jay, August 3, 1788; Sparks, IX, 408.

<sup>4</sup> Washington to Hamilton, August 28, 1788; *Id.*, 420.

its enemies. He half wished that Rhode Island might not accede till this new danger should be over.<sup>1</sup>

In Virginia, the letter was laid hold of as a signal for united exertion in behalf of early amendments. In Pennsylvania it led the Anti-Federalist leaders to call the Harrisburg conferences, which, as we have seen, drew up a long list of amendments.<sup>2</sup> It was Madison's opinion that the assent of the Federalists to the letter could be gained on no other principle than that of purchasing ratification at any price rather than disappoint the city of New York of a chance to become the capital of the new government. But the immediate effect of the action was seen, in Congress, in the prompt and energetic opposition of many of the States to the choice of that town.<sup>3</sup>

The majority for ratification was perilously small. A change of two votes or even a full vote of the convention would have prevented ratification, for a sufficient number of delegates were absent on the twenty-sixth to change the result; yet the Federalists had sufficient cause for joy, which they straightway made public in a grand celebration in New York city.<sup>4</sup> The sentiment of the city had long been pronouncedly federal in tone, and its people had been impatiently awaiting an opportunity to give it vent. Taking full advantage of this pent up spirit of joy, the Federalists arranged an imposing celebration for the fifth of August, in which every municipal interest was represented.

The two most conspicuous objects, in the long procession, were the *Federal Ship* and the banner of the Tal-

<sup>1</sup> Madison to Washington; *Ib.*

<sup>2</sup> See pp. 27, 31, ante.

<sup>3</sup> Madison to Washington, August 24, 1788; Sparks, IX, 549.

<sup>4</sup> The program of the procession is given in the *Pennsylvania Packet* of July 24, August 6, 7, and 8, 1788.

low-chandlers Company, a huge flag with thirteen stripes, displaying thirteen candles, of which eleven were burning in one common flame; those of New York and North Carolina were lighted, but were not joined with the rest. Two faces were displayed on the banner,—Hamilton and Washington, and above the figure of Washington was written the wish of the Nation, that he might be the first President. This was not the limit of the honor shown to Hamilton. Moving amidst the procession was a *Federal Ship*, of thirteen guns, and the name of the ship was *Hamilton*. The honors shown him were deserved; he had been the first to propose the more perfect Union;<sup>1</sup> he had labored unceasingly to bring about the Federal Convention; he had borne a distinguished part in its discussions; he had signed it for the State of New York; he had planned and had been the chief author of the *Federalist*, which remains the classic contemporary exposition of the Constitution; and, in the face of almost insurmountable obstacles, he had carried the Constitution through the Poughkeepsie convention; for it was due to his logic and eloquence that the two Anti-Federalist leaders had ceased their opposition and voted for ratification. The Constitution had now been adopted by eleven States and its inauguration was the next thing to provide for. North Carolina and Rhode Island were delaying, and Vermont, a quasi-State, was doubtful what it ought to do. Happily the civil program which the equities and proprieties of national life demanded, was carried out.

<sup>1</sup> See Vol. I, p. 244.

## CHAPTER V.

### THE NEW GOVERNMENT INAUGURATED; RATIFICATION BY NORTH CAROLINA, RHODE ISLAND AND VERMONT.

The State of North Carolina at this time extended from the Atlantic to the Mississippi. The western counties comprised all the portion then called Frankland, or the District of Washington,—known to us as Tennessee,—and the region between the mountains and the lowlands was decidedly anti-federal. Even the larger towns, and there was not one in the State containing a population of eight thousand souls, did not contain a federal majority.<sup>1</sup> The general assembly willingly agreed to a convention, five days before that of New York adjourned, and it assembled in the Presbyterian church at Hillsboro, with two hundred and twenty-eight members, on the twenty-first of July.<sup>2</sup>

The Federal leaders were William Richardson Davie and Richard Dobbs Spaight, lately delegates to the Federal Convention; Samuel Johnston, the governor; and Archibald Maclain, John Steele and James Iredell; the Anti-Federalists were Willie Jones, David Caldwell, Timothy Bloodworth and Samuel Spencer. It was widely believed that North Carolina would be governed by the conduct of Virginia,<sup>3</sup> and some sanguine Federalists in the South had started the rumor that the people of the State were almost unanimous for the Constitution.<sup>4</sup>

<sup>1</sup> For some account of the geographical distribution of federal and anti-federal sentiments, see Libby, 93.

<sup>2</sup> Elliot, IV, 1; 1788.

<sup>3</sup> Washington to Madison, December 7, 1787; Sparks IX, 286; to Jay, January 20, 1788, Id., 309.

<sup>4</sup> Id., 288.

Though this rumor was not credited by thoughtful men, the prospect of ratification in North Carolina seemed more promising than in New York, for the State was in a less favorable situation to withdraw from the Union.<sup>1</sup>

The Constitution had now been so long before the country that every man of intelligence in the State was prepared to give his vote on the question of adoption; so that when the convention assembled a short session and an immediate decision were expected. The Anti-Federalists, overwhelmingly strong, were led chiefly by Willie Jones, of Halifax, a man of large wealth and an ardent believer in democracy. Unquestionably he was the most influential man in the convention. He favored taking the vote at once and then adjourning. In other conventions it had been the Anti-Federalists who had asked for delay; but in North Carolina it was the Federalists led by Iredell who protested against the undue haste of the Anti-Federalists and their demand for an immediate vote.<sup>2</sup> Jones even preferred that the question should go to the electors directly, for he was confident that they would refuse to ratify,<sup>3</sup> but it was finally decided, and by a great majority, to discuss the Constitution clause by clause.<sup>4</sup>

Little that was said against it, or for it, was new, but the convention differed from any of the other thirteen in its political character, being composed of a greater proportion of Anti-Federalists than assembled elsewhere and giving utterance more perfectly therefore, than any other to all that the opponents of the Constitution demanded. David Caldwell, of Guilford, a Scotch-Irish Presbyterian

<sup>1</sup> Washington to Charles C. Pinckney, June 28, 1788, *Id.*, 390.

<sup>2</sup> Elliot, IV, 4.

<sup>3</sup> *Id.*, 7.

<sup>4</sup> *Id.*, 15.



clergyman, logical and fixed in his opinions, objected to the opening of the preamble, "We the people," for the people, he said, had not empowered the Federal Convention to use their name; to which Davie replied that the Convention, which had been called to decide upon the most effectual means of removing the defects of the Confederation, had submitted the Constitution, believing full well that it would be in no sense binding until it had received the solemn assent of the people,<sup>1</sup> and entering upon a general defense of the new plan he elaborated the meaning of the preamble, showing that the entire instrument was in keeping with its scope and purpose.

Caldwell still demanded to know why the delegates from the States had styled themselves "we the people?" Iredell answered, that the words were not to be applied to the members themselves, but were the style of the Constitution, when it should be ratified by the States.<sup>2</sup> But the plan made the President a law maker, and gave the Vice-President a vote, in case the Senate was equally divided. To which Governor Johnston replied, that if a Senator were to be appointed Vice-President, the State which he represented would either lose a vote, if he was not permitted to vote on every occasion, or in some instances would have two votes; and Iredell added that the President had no power of legislation, but only authority to object to a bill and thus to secure its reconsideration: an assurance against a law passed by a bare majority.<sup>3</sup> Goudy, of Guilford, objected to being represented with negroes, to which Davie made answer, that the southern delegates had insisted on the admission of slaves into representation, because they contributed by their labor to

<sup>1</sup> Id., 16-23.

<sup>2</sup> Id., 23.

<sup>3</sup> Id., 26-27.

the general wealth as well as other members of the community, and as rational beings had the right to be represented. The final conclusion in the matter had been a compromise. But North Carolina, said Galloway, had too few representatives, which Spaight explained was due to the lack of a census of the State and the number proposed was only temporary. Great dread was expressed of the Senate and of the investment of the whole power of impeachment in the House of Representatives. But Johnston and Iredell cited the precedent of the British Constitution, and explained the checks which were imposed upon the management of cases of impeachment and in judgments arising in them.<sup>1</sup>

Especially did the Anti-Federalists object to the long term of the Senate, as well as to its powers, to which Iredell and Davie answered as they had already been answered in the *Federalist*;<sup>2</sup> The Senate must be organized to give stability to the government, and therefore, the term must be sufficiently long.<sup>3</sup> Even Governor Johnston confessed that he could not comprehend the reason for giving Congress power over elections, and he was quickly supported by Spencer, who saw in this grant of authority only a blow at the State legislatures and a tendency toward a consolidated government. Iredell demonstrated that the very existence of the general government would depend on that of the State legislatures; the power over elections had been given Congress to be exercised in case the State did not make adequate provision either by neglect or in time of war.<sup>4</sup> Davie admitted that if there were any seeds in the Constitution

<sup>1</sup> *Id.*, 32-36, 43, 48.

<sup>2</sup> No. LXII.

<sup>3</sup> *Id.*, 37-43.

<sup>4</sup> *Id.*, 54.

which might one day produce a consolidation of government there would be an insuperable objection to it, but as it depended upon the State governments for a House of Representatives, for a Senate and for a President, he thought that the danger was unreal, the whole could never swallow up the members.<sup>1</sup> As in other States so here the Anti-Federalists found nothing to which they could give their approval in that portion of the Constitution which declares the powers of Congress.<sup>2</sup> With Spencer of Anson, they preferred quotas to taxes and imposts,<sup>3</sup> though Spaight clearly showed that a government cannot exist without certain adequate funds, and that requisitions could not be depended upon.<sup>4</sup>

McDowall saw in the taxing power the prospect of an army of tax-gatherers and of a people despoiled of their property.<sup>5</sup> Two governments authorized to tax could not exist together; one must submit, therefore, the State governments must suffer. Goudy asserted that because the people of the State had no gold or silver, or substantial money, with which to pay taxes, the enormous taxing powers of Congress would destroy their liberties,<sup>6</sup> and most of the Anti-Federalists agreed with McDowall, that paper money had saved the country and that to deprive the people of it would trespass on their rights.<sup>7</sup>

Equally objectional to McDowall was the clause fixing a limit to the slave trade. Spaight explained that it was a compromise between the North and the South; South Carolina and Georgia had insisted on the clause

<sup>1</sup> *Id.*, 59.

<sup>2</sup> Article I, Section 8.

<sup>3</sup> Elliot, IV, 75-77.

<sup>4</sup> *Id.*, 82.

<sup>5</sup> *Id.*, 87.

<sup>6</sup> *Id.*, 93.

<sup>7</sup> *Id.*, 88.

expecting to fully supply themselves with slaves during the next twenty years, but this explanation did not satisfy. Iredell pronounced the slave trade inconsistent with the rights of humanity, and declared that its entire abolition would give him the greatest pleasure. By rejecting the Constitution, the evil would not be remedied, whereas, by ratifying it, the trade must cease after twenty years, if Congress should so declare, whatever particular States might wish. Georgia and South Carolina had insisted on the clause, as it would give them opportunity to make up the loss of their slaves, incurred during the war. Galloway wished an end put to the trade, but instead of laying a tax, a bounty should be offered to encourage foreigners to come to the State; yet he feared that the clause meant the manumission of slaves, and he declared that it would be impossible for the white people of the State to be happy if the blacks after enfranchisement were to stay among them.<sup>1</sup>

At this Iredell pointed out the distinction between the words "migration" and "importation" in the clause: the first meaning persons coming into the State as free persons; the last extending to slaves only,<sup>2</sup> and he particularly denied the correctness of Galloway's interpretation that the clause would empower Congress to free the slaves already in the country.<sup>3</sup> The Anti-Federalists hurried the proceedings along, not even offering observations on many parts of the Constitution. This ominous precip-

<sup>1</sup> Compare this opinion with the defense in North Carolina at the time of the adoption of the Fourteenth Amendment, for an account of which see post, Vol. III, pp. 308-315.

<sup>2</sup> Compare a discussion of the same point at the time of the admission of Missouri in 1820; for an account of which see my Constitutional History of the American People, 1776-1850, Vol. I, 274-275. Also post, pp. 360-377.

<sup>3</sup> Elliot, IV, 101-102.

itancy called forth a protest from Davie, who urged a freer and fuller discussion and demanded the cause of the silence and gloomy jealousy of the opposition.<sup>1</sup> But its general and rather sullen feeling was that discussion was a waste of time. Joseph Taylor objected to giving Congress the power to determine the time of choosing the presidential electors and of fixing the same day of election throughout the United States, for the army might be employed to compel the electors to vote at the pleasure of the government. To this astonishing objection Iredell replied, that should the time of elections be different in different States, the electors chosen in one might go from State to State and thus choose the President through undue influence. The method proposed would entirely prevent corrupt combination.

Governor Johnston was in doubt whether by the Constitution the electors were to be chosen by the people at large, or to be appointed by the State legislatures; to which Maclaine answered, that the State legislatures might direct in what manner the electors should be chosen and thus direct it to be done by the people at large,<sup>2</sup> and Spaight added, as a specific answer to Taylor's objection, that, under the Constitution, Congress might prolong an election to seven years; that the power could be exercised properly only by one general superintending government; that different times of election and different times of choosing electors would produce hopeless confusion, to avoid which the provision had been inserted in the Constitution.<sup>3</sup>

The powers of the President, which had called forth

<sup>1</sup> Id., 103.

<sup>2</sup> Id., 104-105. For the manner of appointing electors from 1789 to 1868, see Vol. I, p. 570.

<sup>3</sup> Id., 106.

so many objections in other conventions, were read without remark, which led Iredell to observe that it was too important to be passed by in silence, and he proceeded to explain and defend the executive power.<sup>1</sup> But his argument only led an Anti-Federalist member to remark that he considered this portion of the Constitution defective, especially because it gave the President power to command the army and navy, nor did Spaight's explanation, that the power of raising and supporting armies, rested wholly with Congress, seem to remove his objections. The President's relations to the Senate, in the nomination of officers, was objected to as a clear violation of the true principles of government. He should have a standing council and not be under the necessity of forming a connection with so powerful a body as the Senate, or be content to put himself at the head of its leading members.<sup>2</sup>

Even more objectionable was the association of the Senate and the President in a treaty-making power by which, as McDowall expressed it, the lives and property of the people would be in the hands of eight or nine men. In vain did Davie explain that all civilized nations had concurred in considering treaties as paramount to ordinary acts of legislation; that the power of making them had been placed in other countries in the executive department, and that to prevent delay and party violence as well as to secure the requisite information the method proposed by the Constitution had been adopted. The President and the Senate thus being associated in the treaty-making power the danger had been obviated of entrusting it solely to the executive, of which power the people were deeply jealous; and also by denying it to the

<sup>1</sup> Id., 107-114.

<sup>2</sup> Id., 116.

Senate alone they had made it impossible for a few States to ratify a treaty which might be objectionable to other States. It became necessary, therefore, to give the States an absolute equality in making treaties. True, Montesquieu had laid down the separation of the powers of government as a maxim, but an absolute separation was impossible.<sup>1</sup> In the government of North Carolina<sup>2</sup> the executive and judiciary had a negative similar to that which it was proposed to give to the President and the arrangement had been attended with the most happy effects.

The maxim meant no more than that the whole legislative, executive and judiciary powers should not be exclusively blended in any one instance. Spaight did not omit to point out the inconsistency of Anti-Federal objections to vesting the treaty-making power in the Senate instead of in the House, for the Senate represented the sovereignty of the States; and it was a certain means of preventing a consolidation of the government, if whatever might affect the States in their political capacity was left entirely to them.<sup>3</sup> But McDowall, who had objected to the clause, observed at the conclusion of Spaight's explanation, that he was of the same opinion as before. And Spencer added that he thought no more argument could be used to show that the Constitution properly vested the treaty-making power.<sup>4</sup>

Equally inflexible were the objections to the judiciary. The exclusive jurisdiction of federal courts must prove oppressive in its operation. Perhaps a Bill of Rights

<sup>1</sup> Compare Massachusetts Constitution, 1780, Part I, Article XXX; Kentucky Constitution, 1792, Article I, Sections 1 and 2, also 1799, Id.

<sup>2</sup> New York Constitution, 1777, Article III; Elliot, V, 426.

<sup>3</sup> Id., 123.

<sup>4</sup> Id., 131.

might afford some check upon the power and certainly the Constitution ought to declare clearly, in order to fix the boundary between the powers of government and the rights of the people, that all powers of the States not given up to the United States were expressly and absolutely retained;<sup>1</sup> and particularly was objection made that the Constitution contained no provision for trial by jury. Iredell, in explanation of this omission, observed that the practice in regard to jury trials varied greatly in the different States, and therefore, that the Constitution would have gained nothing by making the provision.<sup>2</sup> It did not deny the right, which therefore was left as it was before. The propriety of having a Supreme Court must be obvious to every man of reflection, as otherwise there could be no way of securing a uniform administration of justice in the several States. To obviate a common grievance owing to which justice between the States was as yet impossible, the Constitution had provided a tribunal to administer equally to all.<sup>3</sup> As to a Bill of Rights, he took the same ground as Wilson, Pinckney and Hamilton, that the Constitution itself was one.

But Iredell's assurance that the right of a trial by jury in civil cases was not in danger and that in criminal cases it was adequately provided for, as the trial was to take place in the State in which the crime was committed, counted for little with the Anti-Federalists like McDowall, who wished to see "everything fixed" in the Constitution.<sup>4</sup>

The opposition agreed thoroughly with Spencer that as the expression "We the people of the United States"

<sup>1</sup> Id., 137.

<sup>2</sup> Id., 145.

<sup>3</sup> Id., 147.

<sup>4</sup> Id., 150.



showed that the new government was intended for individuals, there ought to be a Bill of Rights.<sup>1</sup> In vain did Davie and Iredell assure their opponents that in no instance did the Constitution vest a power in the United States by which the internal policy, or administration of a State could be affected. In the provision defining the Constitution, the laws of the United States and treaties, as the supreme law of the land, Bloodworth saw the destruction of every State law that was in competition and particularly of the tender-laws of North Carolina. With the majority of the opposition, he saw no compensation in the prohibition of the States to emit bills of credit, or to pay their debts in any other money than gold or silver coin. The objection that national supremacy would destroy State sovereignty was both popular and insuperable. Davie and Iredell labored in vain to remove it. It was useless for Davie to repeat the history of the State respecting paper money, or to show that from Maine to Georgia paper emissions and tender-laws had shamefully defrauded the people.<sup>2</sup> It seemed that the whole weight of the opposition centered upon the "sweeping clause," even Johnston, discerning Federalist as he was, declaring that he did not expect so many would object to it. The Constitution, he said, must be the supreme law of the land, otherwise it would be in the power of any one State to counteract the other States and withdraw from the Union. Without this clause the whole Constitution would be a piece of blank paper.<sup>3</sup>

Religious toleration, such as exists in the United States to-day, was unknown at the time of the formation of the Constitution. In their zeal to secure religious freedom,

<sup>1</sup> Id., 153.

<sup>2</sup> Id., 183.

<sup>3</sup> Id., 187-188.

sectarians did not hesitate to advocate the exclusion of men of a different creed from the right to vote or to hold office. Henry Abbott feared that by the power of making treaties, the Roman Catholic religion might be established in the United States. Though he declared himself of no exclusive establishment, he preferred the Episcopal, but certainly there was great danger in omitting some religious test, for if none was required, Deists and Mohammedans might obtain offices, and both Houses of Congress be made up of pagans. It was true the Constitution required an oath, but it did not indicate whether an official should swear by Jupiter, Minerva or Pluto.<sup>1</sup> The very omission of a religious test, Iredell answered, indicated that the intention of the framers of the Constitution was to establish a general religious liberty in America which any discrimination between the sects would defeat. In this country no sect was superior to another. A treaty might authorize a toleration of a foreign religion,<sup>2</sup> but would never establish one in America.

To the objection that the people might choose representatives without any religion, or might admit Mohammedans to office, Iredell responded that it was impossible to exclude any set of men without violating that principle of religious freedom for which the American people had always contended. One member feared lest the Pope of Rome might be elected President, an idea which Iredell confessed had never struck him before, and he intimated that if the objector had read all the qualifications of a President his fears might have been quieted. No one except a native or one who had resided in the

<sup>1</sup> Elliot, IV, 132.

<sup>2</sup> The third Article of the treaty with France, October 21, 1803, by which Louisiana was ceded, declared that the liberty, property and religion of the inhabitants should be protected. *Treaties and Conventions*, 332.

country fourteen years, could be chosen President. Iredell did not know all the qualifications for a Pope, but he believed that he must be taken from a College of Cardinals and doubtless there were many previous steps necessary before he could arrive at the dignity. A native of America must have very singular good fortune, who, after residing fourteen years in his own country should go to Europe, enter into the Romish order, obtain the promotion to cardinal, afterward to that of Pope, and at length be so much in the confidence of his own country as to be elected President, and he thought it would be still more extraordinary if a Pope should resign for the Presidency.<sup>1</sup> But Abbott, after expressing his thanks for the explanation which Iredell had given, observed that it did not answer his objections to an oath.

Governor Johnston, remarking that it would have been as good an argument to assert that the King of England or France or the Grand Turk could be chosen to the Presidency, as easily as the Pope of Rome, attempted to remove the delegate's fears by reviewing the distribution of religious sects in the country; thus the Congregationalists prevailed in Connecticut and Massachusetts; the Baptists, in Rhode Island; the Friends, in Pennsylvania, and the Episcopalians, in Virginia and Maryland; indeed, there were so many sects and so widely distributed, that he thought there was no cause of fear that any one religion would be established.<sup>2</sup> Caldwell, whose profession as a clergyman of the Presbyterian church, might be supposed to have acquainted him with the spirit of toleration, insisted that danger might arise, and particularly at some future period, for the Constitution distinctly invited the Jews and the heathen to come into the country,

<sup>1</sup> Id., 196.

<sup>2</sup> Id., 199.

and all Americans, having any religion, he said, were against the emigration of this people from the Eastern Hemisphere. Even Spencer's explanation, that conscientious persons would not take the test oath and would therefore be excluded,—a sufficient reason for rejecting a religious qualification,—did not quiet Caldwell's fears. He might have received some consolation, however, from Governor Johnston's admission, that while Jews and Pagans would continue to emigrate to the United States, they would be outnumbered by the Christians from other countries, and that in all probability their children would be Christians; so that in time the danger would be removed.<sup>1</sup>

When, on the thirtieth of July, the seventh article of the Constitution had been read and no objection made to it, Governor Johnston moved that the convention ratify without condition, but propose such amendments as it judged expedient.<sup>2</sup> This called forth from the Anti-Federalists a general outburst of objections to the instrument as a whole and to many particular clauses. William Lenoir, of Wilkes, quickly declared that his constituents had instructed him to oppose ratification, because the Constitution did not fairly preserve the right of representation, but permitted too long a term of office, especially in the Senate. It combined executive and senatorial functions in a dangerous manner, and granted altogether too great powers to Congress; but the most serious objection was its aristocratical character and tendency.<sup>3</sup> Spaight answered specifically that the Convention at Philadelphia had not exceeded its powers; that the manner of choosing Representatives, Senators and the President, and their

<sup>1</sup> Id., 200.

<sup>2</sup> Id., 201.

<sup>3</sup> Id., 201-206.

terms and powers, made an aristocracy impossible, and that the exclusive legislation over the Federal District must depend upon the previous consent of the State which would cede it. In brief, the powers of the proposed government were better defined than those of any government before known. But it was useless for Iredell and his friends to deny the truth of the innumerable charges against the Constitution which the Anti-Federalists continued to make; these were rooted in their prejudices and quite beyond the reach of argument.

McDowall wished amendments brought forward as the condition of ratification, and asserted that the greater part of the people of the United States were opposed to the Constitution as it stood.<sup>1</sup> By amendments, Congress should be deprived of its unlimited power over elections. Jury trials should be secured; excessive taxation be prevented; and members of Congress be subject to recall at any time by a State. The President's veto should be modified, the danger of a standing army lessened, and religious liberty be provided for.<sup>2</sup> Willie Jones<sup>3</sup> insisted that amendments should be made to the Constitution before its adoption, though Governor Johnston observed that no amendments from North Carolina could be laid before the other States unless it adopted the Constitution and became a part of the Union. The whole question was in the hands of Jones, for he controlled almost absolutely the great Anti-Federalist majority present. Debate became sharp and personal, but the convention sustained him.<sup>4</sup>

<sup>1</sup> Id., 210. For an estimate of popular sentiment toward the Constitution, see pp. 7-19.

<sup>2</sup> Id., 211-215.

<sup>3</sup> Id., 216.

<sup>4</sup> The previous question was carried by 183 to 84; Id., 223.

Governor Johnston, lamenting the turn of affairs, clearly stated that the motion which had prevailed would not answer the intention of the people of the State, as it determined nothing with respect to the Constitution. If the convention did not decide on the plan, it would have nothing to report to Congress. The State would be entirely out of the Union and isolated. To whom could it refer the amendments which it proposed as the condition of adoption? Congress would have nothing to do with them for its authority extended only to introduce the new government and not to receive any proposition of amendments. Neither could the State present them to the new Congress, for it would have no representatives to introduce them. It might appoint ambassadors to the United States to represent its scruples regarding the Constitution. A number of States had proposed amendments, and also had ratified. They would have great weight in Congress and might prevail in getting material amendments adopted, but North Carolina would have no part in voting upon any of these; it could only be considered as a foreign power. True, the United States might admit North Carolina later, but possibly on terms unequal and disadvantageous to it. Meanwhile, many laws, by which the State would later be bound, might be passed, particularly injurious to its interests.

It was not yet known in North Carolina that New York had ratified. Johnston was not assured that New York would adopt the Constitution, but it was generally supposed, he said, that the principal reason of her opposition was due to a selfish motive; her power indirectly to tax two contiguous States.<sup>1</sup> A similar policy might induce the United States to lay restrictions on North Carolina, if it was out of the Union. It could derive no

<sup>1</sup> See pp. 10, 35.

assistance from New York, for the views of the two States were diametrically opposite. North Carolina wanted all her imposts for her own exclusive support. Even if Congress should receive the North Carolina commissioners, perhaps two years might elapse before the second Federal Convention could meet. Meanwhile Congress would appoint all the great officers and proceed to make laws for the future government of the United States. North Carolina would be deprived of the benefit of the imposts, which, under the new government, would be an additional fund to which all the States had a common right. By insisting upon conditional ratification, the State would lose all benefit of a proportionate share of the duties and imposts collected in the country.<sup>1</sup>

To this Willie Jones replied, that the State had as equal a right to reject as to ratify. He wished North Carolina to be out of the Union. It would be at liberty to come in at any time, and, when it choose to come, it would have as great a share of the imposts as if it should adopt it now; and he remarked that he had in his pocket a resolution,—which he intended to introduce, if the pending proposition was carried, for conditional ratification,—recommending to the North Carolina legislature to lay an impost for the use of Congress on goods imported into the State similar to that which Congress laid on goods imported into the ratifying States. The objection that Congress would fill all the offices, he thought of very little importance, and he had no doubt that whenever a second Federal Convention was called, North Carolina would be invited to attend like the rest.

He knew that there was a great majority against the Constitution in the Convention, and he responded to its wishes. The Virginia amendments with one or two addi-

<sup>1</sup> Id., 223-225.

on the first Wednesday of January; that the President should be chosen on the first Wednesday in February, and that the city of New York should be the place, and the first Wednesday in March the time for commencing proceedings.<sup>1</sup> The long delay was due to the almost hopeless discord of opinions respecting the establishment of the permanent seat of government. The place chosen was the result of the dilemma, to which the opponents of New York were reduced, of yielding to the choice of that city, or of strangling the government in its birth. The times for appointing electors, of choosing the President and of inaugurating the government were adjusted to the meetings of the State legislatures.<sup>2</sup>

The New York circular letter, better known by the name of its author, Governor Clinton, was intended, as the Federalists insisted, to do much mischief. The Anti-Federalists laid hold of it with eagerness as the harbinger of a second general convention. In Pennsylvania, they speedily gathered at Harrisburg under the leadership of Findlay and Albert Gallatin, and succeeded both in drawing up another set of amendments and also in perfecting their political organization in the State. In Virginia, Patrick Henry welcomed the letter and wielded so great an influence as absolutely to control the legislature, and he succeeded in carrying through an invitation to all the States to meet in a second Federal Convention.<sup>3</sup> But in other States, excepting Rhode Island and North Caro-

<sup>1</sup> It was decided by the Supreme Court, later, in the case of *Owings vs. Speed, et al.* (5 Wheaton, 420), that the Constitution of the United States came into operation on the first Wednesday in March, 1789.

<sup>2</sup> *Documentary History*, III, 161-204; Henry Lee to Washington, September 13, 1788; Sparks, IX, 551; Madison to Washington, September 14, 1788, *Id.*, 554.

<sup>3</sup> Rive's *Madison*, II, 646.



every principle of political prudence, that the States should not assent to any new civil obligation till errors in its form were removed. The State had been confederated with the others by a solemn compact which was not to be dissolved without the consent of every member. North Carolina had not assented to this dissolution, and, if it was dissolved, it would be the fault of the ratifying States. If ratification by four enabled them to exclude the other four, North Carolina might be considered as excluded. Each State was free to come into the Union when it thought proper, but he agreed with Jones that exclusion for a time was less dangerous than an unconditional adoption. The convention had arrived at the critical moment when a decision of some kind must be made.

Iredell made an eloquent appeal for ratification, chiefly on the ground that rejection would occasion animosity between North Carolina and the other States and probably separate it from them forever. The most selfish interests of the State demanded that it should ratify. It was unfit that North Carolina should dictate to the whole Union. While many amendments had been proposed by the ratifying States, it was not probable, nor was it desirable, that all of them should be approved; but the probability of the adoption of some was extremely great, for only three States had ratified unanimously, and, in the others, there was a strong opposition; as in Connecticut and Pennsylvania, where it fully equaled one-third; in South Carolina, where it was yet stronger; and in Virginia, where ratification had been secured only by a bare majority. He, too, repudiated the insinuation which Jones had thrown out that the Federalists favored the Constitution because they had its offices and emoluments in view.<sup>1</sup> Davie supported Iredell and compared the sug-

<sup>1</sup> *Id.*, 233-234.

gested dictatorial proposition of North Carolina to the Union to the arrogant address of a beggarly bankrupt to an opulent company of merchants, telling them the terms on which he would enter on a co-partnership. North Carolina was not a wealthy State; it had long been delinquent in its quotas, indeed, it stood foremost on the list of delinquent States; at last it might have to come into the Union on humiliating terms.<sup>1</sup>

The resolution of the Committee of the Whole was then read. It was in the form of a Declaration of Rights, in twenty articles, and of amendments to the Constitution, in twenty-six more.<sup>2</sup> It was understood by the Anti-Federalists that the declaration and the amendments should be made the condition of ratification. Iredell, for the Federalists, anxious to prevent this calamity, then proposed ratification with the recommendation of six amendments similar to those proposed by New York; but his motion was rejected by a vote of one hundred and eighty-four to eighty-four.<sup>3</sup>

On the following day, the second of August, the report of the Committee of the Whole was taken up, and, at the suggestion of Thomas Person and John Macon, the question was put whether the convention would concur with the report, and the vote of the previous day was reversed. Those who had opposed Iredell's motion now voted in favor of the anti-federal amendments; but the resolution which Willie Jones had carried in his pocket, recommending the legislature of the State to enact a law collecting an impost equal to that imposed by Congress on imported goods and appropriating the money raised to the use of the general government, was adopted

<sup>1</sup> Id., 237-239.

<sup>2</sup> Id., 243-247.

<sup>3</sup> August 1, 1788, Id., 250-251.

by a large majority, and it was unanimously agreed that the assembly should be urged to take effectual measures to redeem the paper currency of the State.<sup>1</sup>

The disappointment and chagrin of the Federalists were intensified by the realization of their helplessness. North Carolina, they said, would become a by-word among the nations.<sup>2</sup> Davie did not conceal his disgust at the harangues of Willie Jones on the terror of the judicial power;<sup>3</sup> nor did Hugh Williamson hesitate to say that want of honesty was at the bottom of the opposition to the Constitution.<sup>4</sup> He believed, with other Federalists, that the State should ratify in order to secure the amendments which it desired, and his disappointment at the result was so great that he wrote an apology for North Carolina, which appeared in the northern papers.<sup>5</sup>

On the day when the State rejected the Constitution, Congress had been wrangling for a month over the question of inaugurating the new government. The Federal Convention had outlined the proper procedure and after ratification by nine States, Congress, in order to carry the new government into execution, had only to designate the time and place for its beginning. The ratification of the Constitution by New Hampshire made up the number of States necessary to carry the Constitution into effect, and, on the second of July, Congress began a discussion of the time and place, but it was not until the thirteenth of September, that the last act necessary to the existence of the new government was passed, and it was agreed that the ratifying States should appoint presidential electors

<sup>1</sup> Id., 251-252.

<sup>2</sup> Hooper to Iredell, September 2, 1788; McRee's Iredell, II, 238.

<sup>3</sup> Davie to Iredell, Id., 239.

<sup>4</sup> Williamson to Iredell, September 22, 1788; Id., 242.

<sup>5</sup> New York Daily Advertiser, September 17, 1788.

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<sup>3</sup> Rive's *Madison*, II, 646.

lina, public sentiment detected dangers of disunion in the letter, and its influence was limited to the minority party. All through the winter of 1789, the supporters of the Constitution were anxious lest in some way its enemies might yet cause delay, or even overthrow the plan.

A few members of the old Congress continued to attend until the first of January, but a quorum met for the last time on the tenth of October, 1788. The first Wednesday of March, when the new government should be inaugurated, fell on the fourth of the month. On the evening of the third, the passing of the Confederation was marked by a parting salute of thirteen guns from the fort in New York City, opposite Bowling Green, and at sunrise, on the fourth, a salute of eleven guns was fired in honor of the States that had now entered into the more perfect Union. When twelve o'clock came, the hour designated for the meeting of Congress, only thirteen Representatives and eight Senators were present in Federal Hall. Not until the sixth of April, when Richard Henry Lee, of Virginia, arrived, were six States represented, making a quorum.<sup>1</sup>

The House had been able to organize five days before.<sup>2</sup> Nearly all the members chosen to both branches had participated in the work of the Federal Convention or in that of the ratifying conventions. Of the Senators who had attended the Federal Convention were John Langdon, of New Hampshire, who was chosen President of the Senate for the express purpose of opening the certificates and counting the electoral votes; Caleb Strong, of Massachusetts; Oliver Ellsworth and William Samuel Johnson, of Connecticut; William Patterson, of New Jersey; Robert Morris, of Pennsylvania; Richard Bassett and

<sup>1</sup> *Annals of the First Congress*, II, 16.

<sup>2</sup> *Id.*, 100.

George Read, of Delaware; Pierce Butler, of South Carolina and William Few, of Georgia.

In the House were Nicholas Gilman, of New Hampshire; Elbridge Gerry, of Massachusetts; Roger Sherman, of Connecticut; George Clymer and Thomas Fitzsimons, of Pennsylvania; Daniel Carroll and John Francis Mercer, of Maryland; James Madison, of Virginia, and Abraham Baldwin, of Georgia. Frederick Muhlenberg, who had presided over the ratifying convention of Pennsylvania, was elected Speaker of the House.

On the sixth of April, the electoral votes for President and Vice-President were counted, in the Senate chamber, in the presence of both Houses, and it was found that Washington, having received sixty-nine, was the unanimous choice for President, and that John Adams, of Massachusetts, who had received thirty-four, the next highest number, was elected Vice-President.<sup>1</sup>

New York, obedient to the influence of Clinton, had refused to appoint electors, and North Carolina and Rhode Island had not yet ratified the Constitution. Charles Thompson, the faithful secretary of the old Congress, throughout its history, was appointed to bear the news of the election to Washington, and Sylvanus Bourne was made a special messenger of the Senate to carry a like message to John Adams.<sup>2</sup> Washington was reluctant to assume so novel, so trying a duty; but convinced that the successful inauguration of the new government depended upon his identification with it, he accepted the task.<sup>3</sup> "The

<sup>1</sup> Id., 17.

<sup>2</sup> Id., 18.

<sup>3</sup> See Washington's letters to John Armstrong, April 25, 1788; to Lafayette and Rouchambeau, April 28, 1788; to Hamilton, August 28; to Henry Lee, September 22; to Hamilton, October 3; to Benjamin Lincoln, October 26; to Gouverneur Morris, November 28; to Jonathan Trumbull, December 4; to Samuel Hansen, January 18, 1789, et al.

first wish of my soul," said he, "is to spend the evening of my days as a private citizen on my farm."<sup>1</sup> His progress from Mount Vernon to New York was a triumphant procession.

On the day of his arrival at the capitol, the Senate was engaged in discussing the style in which he should be addressed; and much difference of opinion prevailed. Should it be simply "Mr. President" or "Your Excellency"? A joint committee decided that it should be "The President of the United States," but the Senate, dissatisfied with so simple a title, disagreed with the report and recommended that the title should be "His Highness, the President of the United States and Protector of their Liberties." The more democratic House promptly rejected this title; further discussion ceased and the matter was left to be settled by practice. The inaugural ceremonies were simple and were arranged by a Joint Committee.<sup>2</sup> On the thirtieth of April, the President should be received by both Houses in the Senate chamber, from whence they should proceed to the House of Representatives, where Robert R. Livingston, the Chancellor of the State of New York, should administer the oath to the President. Federal Hall, the new capitol building, was the old City Hall of New York, but now transformed for Federal purposes, and the change, which had been effected through the generosity of private citizens, had been made under the direction of Major Pierie Charles L'Enfant, a French officer of engineers and already famed as an architect.

Inauguration day was ushered in with a salute from Fort George at sunrise, and, at nine o'clock, the church

<sup>1</sup> Letter to Samuel Hansen, January 18, 1789.

<sup>2</sup> From the Senate, Langdon, Johnson and Few; from the House, Benson, Peter Muhlenberg and Griffin.

bells were rung, summoning the people to special services in commemoration of the great event.<sup>1</sup> At half past twelve o'clock, Washington, preceded by the military and accompanied by the officials of the city, by the foreign ambassadors and by a multitude of citizens, was conducted from the Executive Mansion to Federal Hall. The oath of office was administered on the balcony of the Senate Chamber in full sight of the people. Livingston proclaimed in a loud voice, "Long live George Washington, the President of the United States," which was a signal for an outburst of repeated huzzas and shouts of "God bless our Washington! Long live our beloved President!" Cannons were fired, and flags unfurled all over the city. The President then retired to the Senate Chamber, where he read an address. At its conclusion, the two Houses and all who had participated in the inaugural ceremonies, accompanied the President, the Vice-President and the Speaker to St. Paul's church, where services, suited to the occasion, were conducted by the Chaplain of the Senate, Samuel Provost, the Bishop of the Episcopal church in the City of New York. After the service was read, Washington was conducted back to the Executive Mansion. With these simple ceremonies the new government was inaugurated.

Washington immediately appointed the members of his Cabinet, having been for some time in correspondence with them, and having received assurance that their nominations and those of others in other departments would be accepted by them. Naturally he chose to summon to his aid those who had sympathized with him in his efforts to secure a more perfect Union. Hamilton he made Secretary of the Treasury; Randolph, who, though he had re-

<sup>1</sup> A description of the inauguration from the diary of Tobias Lear, the President's Secretary, is given in Sparks, X, 363-364.



fused to sign the Constitution, had voted for its ratification in Virginia, was named for Attorney-General; John Jay, to whom ratification in New York was largely due, became Chief-Justice of the United States; and associated with him were John Rutledge, of South Carolina, James Wilson, of Pennsylvania, and John Blair, of Virginia, all of whom had served with Washington in the Federal Convention; Gouverneur Morris, who at this time was in Europe, was appointed commissioner to England.

Long before all these appointments were made, Congress had taken up the question of amendments, the discussion of which began on the eighth of June. Though Delaware, New Jersey and Georgia had proposed none, and though none came up officially from the Pennsylvania convention, the aggregate from the eleven ratifying States was one hundred and seventy-five, and it was known before the discussion ceased that North Carolina had recommended forty-six more. On the twenty-fifth of September, 1789, Congress sent forth twelve<sup>1</sup> for the approval of the State legislatures.

There is no evidence that the members of the North Carolina Convention of 1788, who had voted to reject the Constitution, had any notion of keeping the State permanently out of the Union. They realized almost as clearly as did their federal opponents that the Confederation had failed and that a stronger general government was necessary, but they were tenacious of the rights and powers of the separate States and fearful lest, under the Constitution as submitted to them, these might be infringed; therefore the North Carolina convention preferred to keep the State out of the Union rather than ratify a Constitution, which as the majority of its dele-

<sup>1</sup> The history of these amendments is given in detail post, pp. 199-330. The twelve submitted are reprinted in Elliot, I, 338.

gates believed, did not guarantee the rights of the States. The safeguard which they would throw around the State would be found in amendments, such as they had proposed.<sup>1</sup> North Carolina did not reject the Constitution in 1788, but proposed amendments and left the question of ratification for future consideration.

During the fifteen months following the adjournment of the Philadelphia Convention, public sentiment toward the new Constitution greatly changed all over the Union. In North Carolina, opposition to it ceased in great measure because Congress, it was known, intended to submit a number of amendments to the States, and some of these would remove many objections which North Carolina had raised. Federalists and Anti-Federalists, in the State, quite agreed that it ought to come into the Confederation, as the Union was then termed, in order to preserve the balance of power for the South.<sup>2</sup>

On the sixteenth of November, 1789, this change in the opinion of its people resulted in the assembling of its second ratifying Convention at Fayetteville.<sup>3</sup> Among its members were Hugh Williamson, of Tyrrell county; William Blount, of Tennessee, and William R. Davie, of Halifax, who had represented the State in the Philadelphia Convention, and, with the exception of Iredell, nearly all the members of the Convention of the year before.

<sup>1</sup> For these amendments see Documentary History, III, 266, et seq.

<sup>2</sup> Pierce Butler to Iredell; McRee's Iredell, II, 264.

<sup>3</sup> Three hundred and fifty copies of the Journal of this Convention were ordered by it to be printed. From the copy deposited with the Secretary of State a reprint was made in the State Chronicle of Raleigh, North Carolina, November 18, 1889. A copy of this reprint which I have consulted belongs to Professor Stephen B. Weeks of Washington, D. C., and forms a part of his extensive collection of historical material relating to the State of North Carolina.

Governor Johnston was again unanimously chosen President. No record of the debates has been preserved. The journal shows that on the twenty-first, Davie proposed that the Constitution and the twelve amendments submitted by Congress should be adopted. Some of the great and most exceptional parts of the Constitution had not undergone the alteration which had been thought necessary by the last convention, and many insisted that previous to ratification the additional North Carolina amendments should be laid before Congress that they might be adopted and made a part of the Constitution.

This, however, was rejected, apparently because it made ratification conditional upon the adoption of these new amendments, to obviate which difficulty, James Galloway, of Rockingham, and Joseph McDowall, of Burke, moved for ratification with the recommendation that the general assembly of the State endeavor to obtain the adoption of these amendments. This form of ratification was also rejected, but the Constitution was adopted and ratified by a vote of one hundred and ninety-four ayes to seventy-seven nays. Finally, on the twenty-third, Galloway, from the committee appointed to prepare and draw up amendments, reported a resolution enjoining on the Representatives of the State in Congress to urge the adoption of the eight amendments now proposed,—and in this form of the report the convention concurred.

The eight amendments now proposed were in substance the remainder of the twenty-six proposed the year before, and did not appear among those which Congress had lately submitted to the States.<sup>1</sup> The Representatives of the State

<sup>1</sup> The amendments which are published with the act of ratification in the third volume of the Documentary History, are those adopted by the North Carolina Convention of 1788. Those debated a year later are not given.

in Congress were instructed to demand that the Constitution should be so amended that Congress should not exercise any authority over the election of Senators or Representatives unless the legislature of a State should fail to provide for the election;<sup>1</sup> that neither directly nor indirectly should Congress interfere with any one of the States in the redemption of paper money already emitted and in circulation, or in liquidating the public credits of any State, but that each should have the exclusive right of making such laws for the purpose as it should think proper.<sup>2</sup> Members of either House of Congress should be ineligible to hold any federal office during their term.<sup>3</sup> The journals of the two Houses should be published at least once a year, excepting such parts as in their judgment required secrecy,<sup>4</sup> and at least once in every year should a regular statement be published of the receipts and expenditures of the general government.<sup>5</sup> No navigation law or one regulating commerce should be passed without the consent of two-thirds of the members present in both Houses.<sup>6</sup> No soldier should be enlisted for a longer term than four years, except in time of war, and then for no longer term than its continuance,<sup>7</sup> and finally that some tribunal other than the Senate should be provided for the trying of impeachments of senators.<sup>8</sup> These amendments are of interest chiefly because they formulate quite accurately the political platform on which the Anti-Federalists stood at this time, and which, with modifica-

<sup>1</sup> No. XVII of the Amendments of 1788.

<sup>2</sup> No. XXV of the Amendments of 1788.

<sup>3</sup> No. IV of the Amendments of 1788.

<sup>4</sup> No. V of the Amendments of 1788.

<sup>5</sup> No. VI of the Amendments of 1788.

<sup>6</sup> No. VIII of the Amendments of 1788.

<sup>7</sup> No. X of the Amendments of 1788.

<sup>8</sup> No. XX of the Amendments of 1788.

tions, became a part of the political creed of that great party which Jefferson organized in the closing years of the eighteenth century.

Though our knowledge of the proceedings in the second North Carolina Convention is incomplete—the correspondence of the times leads us to believe that the opposition to the Constitution in 1789, was tedious and trifling, rather than reasonable, as is shown by the conduct of the minority in walking out of the Hall when the vote on ratification was made known.<sup>1</sup> The change in public sentiment in the State was largely due to the remarkable influence of James Iredell.<sup>2</sup> His extraordinary service to the Union was speedily recognized by his appointment, while yet under forty years of age, as an Associate Justice of the Supreme Court of the United States.<sup>3</sup> The intensity of feeling which prevailed in North Carolina at this time is hinted at in a letter of Richard Dobbs Spaight to Iredell, that the ratification marked the dissolution of the clouds of ignorance and villainy which had overhung the State.<sup>4</sup> With the accession of North Carolina to the Union, the fortunes of all the southern States were identified with it. Washington spoke words, whose meaning was deeper than those of ordinary compliment, when, early in the new year,<sup>5</sup> he congratulated the two Houses of Congress on the action of North Carolina, and on the favorable prospect of public affairs which it opened up. Had he chosen, he might have added that on the twenty-

<sup>1</sup> Maclaine to Iredell, November 26, 1789; McRee's Iredell, II, 273.

<sup>2</sup> Charles Johnson (Speaker of the Senate and Vice-President of the Convention of 1789) to Iredell, November 23, 1789; Id., 273.

<sup>3</sup> His commission bears date, February 10, 1790.

<sup>4</sup> Spaight to Iredell, November 26, 1789; Ib.

<sup>5</sup> January 8, 1790; Sparks, XII, 7.

second of December, the State had ratified the twelve amendments which Congress had submitted, and that the principal objections which it had once raised to the Constitution were thereby removed.<sup>1</sup>

When North Carolina ratified the Constitution, the Congressional amendments had been before the States for nearly two months, and, excepting the second article, had been approved by New Jersey the day before. Maryland approved on the nineteenth of December, and North Carolina three days later. South Carolina, New Hampshire and Delaware followed in January;<sup>2</sup> and Pennsylvania and New York in March.<sup>3</sup>

Meanwhile the people of Rhode Island had been agitating ratification. In the Federal Convention, Rhode Island had been treated as if present, and no word had been spoken which intimated any hostility toward her. Upon the receipt of the Constitution, the assembly caused copies to be sent to each of the twenty-nine towns in the State that the people might consider it in their town-meetings.<sup>4</sup> While it was agreed by a large majority<sup>5</sup> that the Constitution should thus be submitted to a popular vote, yet the assembly refused to call a convention.<sup>6</sup> The town of Little Compton instructed its members of assembly to demand a convention, and similar instructions

<sup>1</sup> For the ratification of the amendments see Documentary History, III, 335.

<sup>2</sup> South Carolina agreed to all; New Hampshire rejected the second, and Delaware the first.

<sup>3</sup> Pennsylvania agreed to all except the first, and New York to all except the second.

<sup>4</sup> The action of Rhode Island respecting the Constitution is related in Staple's Rhode Island in the Continental Congress, which also reprints all that is preserved of the minutes of the Newport Convention.

<sup>5</sup> Forty-three to 15.

<sup>6</sup> Thirty-six nays to 16 ayes.

came up from Newport, Providence and Bristol. Most of the Federalists refused to vote and out of a total registration of nearly forty-five hundred, only two hundred and thirty-seven votes were cast in favor of the Constitution, while two thousand seven hundred and eight were cast against it.<sup>1</sup> The refusal of the Federalists to participate in the election was inspired by their belief that the assembly had not submitted the Constitution in a proper manner. The State was divided into hostile factions, the country against the town; the rural districts against Newport, Bristol and Providence. Indeed, the people of Providence could scarcely restrain their wrath at the conduct of the assembly, and on the fourth of July, they celebrated the adoption of the Constitution with all the zeal shown by the people of Philadelphia. Though an Anti-Federalist mob, among whose leaders was one of the judges of the State, attempted to break up the rejoicings at Providence, the Federalists treated the interruption with such civility that most of the rioters, shamed into decency, retired and slunk out of sight.<sup>2</sup>

Though nine States had now ratified, and the Congress of the Confederacy had ceased to maintain a quorum, indeed, had ceased to exist, the people in Rhode Island, in their general election in May, 1789, chose five delegates as usual, as if the Confederation was still in being. Clinton's circular letter was submitted by the assembly to the towns in October following its appearance, but they took no special action. Indeed, before December, 1788, eight towns had instructed their assemblymen to demand a convention. A fifth effort, therefore, was made by the

<sup>1</sup> Staples, 589; the names of all persons who voted are given on p. 591, et seq.

<sup>2</sup> See the account from the Gazette and Chronicle in Staples, 609-611.

friends of the Constitution in the assembly, in March following, to call one, but was unsuccessful.<sup>1</sup> About five hundred citizens of Providence signed a petition demanding a convention and sent it to the assembly at its June session, but the effort was again defeated.<sup>2</sup>

The opponents of the Constitution, at the special session in September, wished to submit the question to the towns whether their delegates in the assembly should call a convention, but this was only for the purpose of delay, for it was at this session that Governor Collins, at the direction of the assembly, sent a letter to the President and Congress explaining the refusal of the State to ratify; that it was chiefly because the Constitution too strongly resembled the British Constitution, and because the State was waiting to see the proposed system organized and in operation and also what further checks and guards would be established by way of amendments before it ratified.<sup>3</sup> It was this apologetic letter which drew forth from Washington the severe judgment, that there would be no doubt of the accession of Rhode Island had not the majority of its people "bid adieu long since to every principle of honor, common sense and honesty,"<sup>4</sup> but he was cheered by the prospect of a better disposition in the Rhode Island assembly at its next session, for it was said that a material change had taken place at its late election of representatives. The act of Congress, regulating the tonnage duties, contained a special exemption extending to ships and vessels wholly owned by citizens of Rhode Island and North Carolina, but the exemption expired on the

<sup>1</sup> Thirty-seven nays to 19 ayes.

<sup>2</sup> Thirty-two to 22.

<sup>3</sup> The letter is given in Sparks, X, 487.

<sup>4</sup> Washington to Gouverneur Morris, October 13, 1789; Sparks, X, 39.



fifteenth of January of the following year.<sup>1</sup> It was not impossible, therefore, if Rhode Island persevered in refusing to ratify, that the United States might be under the necessity of discriminating against the State, and thus become involved in issues of great gravity.

The federal part of its population, helpless so long as its assembly continued its injurious policy, was beginning to hint at a foreign alliance. The congressional amendments were sent to Rhode Island as to other States, and were submitted by the assembly to the towns, but were not voted on. Providence, Newport and Bristol assembled in their town-meetings, again drew up protests and petitions and demanded ratification in order to avoid the discriminating tonnage duties which Congress might levy. Indeed, the merchants of these cities were taking measures to have a convention called in spite of the assembly. At the October session, 1789, the question of calling one was defeated for the seventh time,<sup>2</sup> but expostulation was now so strong, from the more substantial citizens of the State, that the assembly, on the eleventh of January, 1790, again took up the question of a convention, and it was carried in the House of Representatives,<sup>3</sup> but the Senate passed a bill of its own that a special election should be held so that the freemen might instruct their representatives on the subject.

The House refused to concur in this amendment and in the Senate, which again took up the House bill, the vote stood four Senators and the deputy-governor for the measure and four Senators against it. The assembly then adjourned till Sunday morning. Public excitement at Newport was now at the highest pitch and was sustained

<sup>1</sup> September 16, 1789. Statutes at Large, I, 69.

<sup>2</sup> Thirty-nine to 17.

<sup>3</sup> Thirty-four to 29.

by the report that the House had voted, **thirty-two** to **eleven**, for a convention. The Senate, still **opposing**, took up a bill submitted by the deputy-governor for a special election on the twenty-sixth of January, to have the freeholders instruct the delegates, but in this the House refused to concur. The Senate then took up the question whether to concur in the House bill, and, **one** Senator being absent, the vote was a tie; four Senators favoring concurrence and the deputy-governor and three Senators opposing it. The fate of the bill, therefore, rested with the governor, John Collins, and he voted for concurrence. Thus on Sunday, the seventeenth of January, it was at last agreed that, on the eighth of February, a special election of delegates should be held in the town-meetings and that the ratifying convention should meet at South Kingston on the first Monday of March.

The delegates elected were seventy in number. Five had served in the old Congress; four had been deputy-governors and more than forty had belonged to the assembly. As a body, they were not instructed by their constituents, though Portsmouth specifically directed its four delegates to vote for the Constitution, and Richmond instructed its two representatives to vote against it. Among the members were Jabez Bowen and William Barton of Providence, and John Brown of Hopkinstown, who, with ten other citizens of Rhode Island, on the eleventh of May, 1787, had joined in a letter to the Federal Convention, lamenting the refusal of the Rhode Island legislature to send delegates and pledging their influence and best exertion to support whatever plan the Convention might submit.<sup>1</sup>

Daniel Owen, of Gloucester, was chosen President, when, on the eighth of March, the Convention began its

<sup>1</sup> See the letter in Elliot, V. 578.

session. On the following day, John Sayles of Smithfield, moved for a committee to form a Bill of Rights and amendments to the Constitution, and the instrument was taken up by paragraphs. Congdon of North Kingston objected to numbers as an unequal basis of taxation, to which Bowen replied that no such objection had been made in other States. Comstock, of East Greenwich, objected to the protection of the slave-trade till 1808, but Hazzard of South Kingston remarked, that the trade was left to each State for itself, and that it did not particularly concern Rhode Island,—although it is to be presumed that he had looked into the slave-pens of Newport. Rhode Island, he said, had abolished the trade, but he was opposed to enslaving the whites and enfranchising the blacks. He was fully supported by General Miller, who pronounced slavery Biblical, though Colonel Barton, who claimed equal knowledge of the Scriptures, pronounced it un-Biblical. The Committee of Ten finally reported a Bill of Rights in eighteen sections, and amendments in twenty-one.<sup>1</sup> In order that these might be submitted to the people in their town meetings, the convention adjourned on the sixth of March, to meet at Newport on the twenty-fifth of May.

During the recess, the forty-one propositions were voted on by the freeholders in all the towns. Richmond, Middleton and Charleston approved them, but North Kingston promptly rejected them and demanded that some real and substantial ones should be submitted, particularly protecting the sovereignty of the State; empowering its legislature to recall senators, and forbidding Congressmen to fix their own pay. Portsmouth and Providence

<sup>1</sup> They are given in Elliot, I, 334-337; also in Documentary History, III, 311-319; The amendments here reprinted, probably differ in form from the original draft submitted by the Committee.

were less interested in the amendments than in ratification, and instructed their delegates to delay no longer to approve the Constitution, and the electors of Providence plainly said that if the Constitution was not ratified, straightway, the city might secede from Rhode Island and adopt a Declaration of Independence.

When the Convention re-assembled, the demands of the towns for ratification were so imperative that it could no longer be delayed, and, on the twenty-ninth of May, the Bill of Rights and the amendments were adopted, and ratification was carried by a vote of thirty-four to thirty-two.<sup>1</sup> The legislature, in special session, called in June, ratified eleven of the twelve Congressional amendments on the fifteenth, and being the ninth State that had approved ten of them, this number became by the act a part of the Constitution. United States Senators were immediately chosen,<sup>2</sup> and, in the election in August, the people elected a representative to Congress.<sup>3</sup> The ratification of the Constitution by Rhode Island brought into the more perfect Union all the members of the old Confederation. In acknowledging a letter from the Governor of the State, communicating the news of ratification, Washington replied, that the bond of Union was now complete.<sup>4</sup> The event, he said, would make possible a fair experiment of the Constitution, which had been formed solely with the view to promote the happiness of the people.<sup>5</sup> Rhode Island has not lacked apologists who have defended its delay to ratify, claiming that it chose to maintain the old Articles of Confederation, which other States had deliberately broken down.<sup>6</sup>

<sup>1</sup> For the ratification see *Documentary History*, III, 291.

<sup>2</sup> Thomas Foster and Joseph Stanton.

<sup>3</sup> Benjamin Bourne.

<sup>4</sup> Washington to Arthur Fenner, June 14, 1790; *Sparks*, X, 93.

<sup>5</sup> Washington to Count DeSegur, July 1, 1790; *Id.*, 103.

<sup>6</sup> Staples, 685.

The people inhabiting that portion of New England long called the New Hampshire Grants, had organized a State government under the name of Vermont early in the year 1776;<sup>1</sup> had issued a Declaration of Independence, in January following,<sup>2</sup> and, in April, had petitioned Congress for admission into the Confederation, but unwilling to offend New Hampshire, Massachusetts and New York, which laid claim to the soil and jurisdiction of the region, Congress did not include them in the Union.<sup>3</sup> For thirteen years they maintained their independence and State organization and were not surpassed by the inhabitants of any other Commonwealth in their devotion to the principles of the Revolution.

Finally, in October, 1790, the boundary dispute between Vermont and New York was amicably settled,<sup>4</sup> and, early in January of the following year, a convention assembled at Bennington, for the purpose of ratifying the Constitution.<sup>5</sup> It was urged by the Anti-Federalist members that the State ought not to be obliged to assume any portion of the public debt or make any sacrifice for the sake of entering the Union, because the interests of Vermont in the federal government were entirely indirect and it had always been treated as an enemy by

<sup>1</sup> For the proceedings of the Vermont Constitutional convention, see Collection of the Vermont Historical Society, I, 1-56.

<sup>2</sup> January 15, 1777; *Id.*, 43-47.

<sup>3</sup> For the documents relating to the boundary controversies, see Slade's, *Vermont Papers*.

<sup>4</sup> By the act of October 28, 1790, by which the Vermont legislature directed the payment of \$30,000, to be made to the State of New York; Slade, 193.

<sup>5</sup> The Proceedings of this Convention are given in the Records of the Governor and Council of the State of Vermont, III, (1875) Appendix, I, 464, et seq. Thomas Chittenden was chosen President and Moses Robinson, Vice-President. The Proceedings of the Convention are also given in the Vermont Gazette, January 10 to February 14, 1791. It assembled January 6, and adjourned on the 10th.

Congress. Moreover, by maintaining its independence and by acting the part of a neutral between Great Britain and the United States, between which war might soon break out again, it would be relieved of the vast expense of membership in the Union. Congress ought first to assume the revolutionary debt of the State and to ratify its boundary treaty with New York. Though ratification might ultimately be made, the State should not rush forward uninvited into the Union. One Anti-Federalist member urged adjournment till October, by which time the electors in the State could be consulted.

To all these objections the Federalists made the very reasonable reply, that the State could not maintain its independence, for it would be a position which must ultimately prove untenable; nor did the friends of the Constitution neglect to assert that it was only in those towns of the State remote from every channel of intelligence, that the people entertained groundless jealousies toward the Constitution; the freemen of the State at large were in favor of immediate ratification. The ten amendments which had been added to the Constitution, it was said, were to be attributed to a spirit of delay and caution. To the question whether ratification would include the amendments, it was answered, though clearly inaccurately, that, by the proceedings in Rhode Island, ratification would include them. On the tenth of January, the Constitution was ratified by a vote of one hundred and five ayes to four nays,<sup>1</sup> and in February following, Congress admitted Vermont into the Union,<sup>2</sup> as "a new and entire member of the United States of America."

<sup>1</sup> For the ratification see Documentary History, III, 371. Slade's Papers, 194; and Records of the Governor and Council of the State of Vermont, III, 481.

<sup>2</sup> February 8, 1791; Statutes at Large, I, 191.

When, three days after the vote on ratification, the news reached Albany, fourteen guns were fired from Fort Hill in honor of the event. Not until the eighth of March was the ratification celebrated in Vermont, when, at Rutland, the accession to the Union was observed with pleasing ceremonies. At six o'clock in the morning, the Federal Standard was raised, with fifteen stripes, and emblazoned with two stars, representing Vermont and Kentucky. Fifteen toasts were drunk and the ceremonies came to an end with the singing of the Federal song.<sup>1</sup> The accession of Vermont made the Union both complete and compact and brought into one nation the people of all the English colonies which had participated in the Revolution. The friends of the new government now had ample cause for rejoicing; all the States of the original Confederation were once more united, and Vermont had joined them.<sup>2</sup>

The convention of Vermont was the fourteenth and last of those which ratified the original Constitution. The period of ratification extended from the third of December, 1787, when Delaware assembled, till the tenth of January, 1791, when Vermont adjourned, an aggregate of one year, two months and fourteen days, during which conventions were in session. The first and the last continued each five days. The longest session was in Rhode Island, which, during the two meetings of its convention, was in session sixty-five days. The next in order of

<sup>1</sup> A part of one of the verses ran:

Come every Federal son,  
Let each Vermonter come,  
And take his glass long live great Washington.

• • • •

Then each shout as he says,  
Federal Huzza.

See the Vermont Gazette, January 24, 1891.

<sup>2</sup> Washington to Lafayette, June 30, 1890; Sparks, XII.

length were Pennsylvania, which was in session forty-six days, and New York, which was in session forty. With the exception of Rhode Island and Vermont, there was almost a continuous session of conventions from the time when Delaware assembled until North Carolina adjourned its first convention.

Thus it happened that two States were in session at the same time: Delaware and Pennsylvania, from the third to the seventh of December; and Pennsylvania and New Jersey, from the eleventh to the fifteenth, in 1787. With the opening of the year 1788, Georgia and Connecticut were in session on New Year's day, and Connecticut and Massachusetts on the ninth of January. During June, of that year, New Hampshire, Virginia and New York were in session together ten days, from the eighteenth to the twenty-seventh of the month, and New York and North Carolina, from the twenty-first to the twenty-sixth of July. New Hampshire, North Carolina and Rhode Island each held two sessions of their conventions, though, as has been related, for different reasons. In the aggregate the States adopted four Bills of Rights, comprising ninety-three articles and, in addition, one hundred and forty-five amendments.<sup>1</sup> In both the Bills and the amendments there were many repetitions, so that it is difficult, if not impossible, to state exactly how many separate provisions were proposed. Excepting those of Rhode Island, in the aggregate thirty-nine in number, all were considered by Congress when it made up its list.

Of the fourteen ratifying States, only three, Delaware, New Jersey and Georgia, adopted the Constitution unanimously and without proposing amendments.<sup>2</sup> In the

<sup>1</sup> See table, p. 197.

<sup>2</sup> The Pennsylvania Convention adopted none, but the minority speedily adopted fourteen and the Harrisburg Convention twelve more, all of which were considered by Congress.



eleven ratifying States, whose action made the Constitution unquestionably secure,<sup>1</sup> the vote on ratification was seven hundred and forty-three ayes and four hundred and sixty-seven nays. Yet this vote of nearly two to one would greatly mislead us did we not know that a change of twenty-four votes in the seven hundred and forty-three, which gave us the Constitution, would have caused its rejection, and the narrow margin of defeat seems the more startling when upon further examination, we discover that a change of two votes in New York, of six, each, in New Hampshire and Virginia and of ten in Massachusetts, would have caused this calamity.

Including the conventions of North Carolina, Rhode Island and Vermont, the vote stood, in the aggregate, ten hundred and seventy-five for the Constitution and five hundred and seventy-eight against it, or a majority of nearly two to one. It is only within recent years that an attempt has been made to discover the distribution of the popular vote on the Federal Constitution. The exact registry can never be known, but careful research has discovered what counties were federal at this critical time.<sup>2</sup> Proceeding on the assumption that, in the aggregate, the delegates represented the wishes of their constituents; and, considering the varying size of the districts represented, it may be concluded that, taking the States together, the districts did not vary from one another greatly in population. We are led to the conclusion that the proportions of the popular vote favorable and unfavorable to the Constitution were fairly well indicated by the votes of the delegates in the conventions. If this

<sup>1</sup> That is including North Carolina, Rhode Island and Vermont.

<sup>2</sup> In Appendix C, to Mr. Libby's monograph on The Geographical Distribution of the Vote, federal and anti-federal counties in all States including Vermont, Kentucky and Tennessee are shown in detail.

be true, it follows that, excluding the negro population<sup>1</sup> and taking the census of 1790,<sup>2</sup> as a basis, the delegates who voted for the ratification of the Constitution in the State conventions represented about two millions<sup>3</sup> of people, and the delegates who opposed it represented a little over one million.<sup>4</sup> As the number of voters in the country, at this time, was not far from one hundred and fifty thousand, it also follows that the Constitution was in a popular sense ratified by a majority of about fifty thousand votes.<sup>5</sup> The almost imperious demand for amendments and a Bill of Rights clearly enough indicated what subject would head the calendar when Congress should enter upon its duties.

<sup>1</sup> Six hundred and ninety-seven thousand eight hundred and ninety-seven slaves and 59,466 free persons of color.

<sup>2</sup> Total population 3,929,827.

<sup>3</sup> Two million six hundred and sixty thousand seven hundred and thirty-nine.

<sup>4</sup> One million one hundred and five thousand seven hundred and twenty-five.

<sup>5</sup> Important data relating to the ratifying conventions are contained in the following table:

Order of Ratification.	Time of Ratification.	Meeting of Convention.	Length of Session. days.
Delaware.	Dec. 7, '87.	Dec. 3-7.	5
Pennsylvania.	Dec. 12, '87.	Nov. 1-Dec. 15.	46
New Jersey.	Dec. 18, '87.	Dec. 11-20.	10
Georgia.	Jan. 2, '88.	Dec. 25-Jan. 2.	8
Connecticut.	Jan. 9, '88.	Jan. 1-9.	9
Massachusetts.	Feb. 16, '88.	Jan. 9-Feb. 27.	29
Maryland.	Apr. 28, '88.	Apr. 21-26.	6
South Carolina.	May 23, '88.	May 12-23.	12
New Hampshire.	June 21, '88.	{ Feb. 13-23. } { June 18-21. }	{ 10 } { 4 } 14
Virginia.	June 26, '88.	June 2-27.	26
New York.	July 26, '88.	June 17-July 26.	40
North Carolina.	Nov. 21, '89.	{ July 21-Aug. 4. } { Nov. 16-21, '89. }	{ 14 } { 5 } 19
Rhode Island.	May 29, '90.	{ Mch. 8-May 6, '90 } { May 25-29, '90. }	{ 60 } { 5 } 65
Vermont.	Jan. 10, '91.	Jan. 6-10, '91.	5

	Vote on Con- stitution.	Bill of Rights.	Amend- ments.
Delaware.....	30 (unanimous)	None	None
Pennsylvania.....	46 to 23	None*	None*
New Jersey.....	38 (unanimous)	None	None
Georgia.....	26 (unanimous)	None	None
Connecticut.....	128 to 40	None	None
Massachusetts.....	187 to 168	None	9
Maryland.....	63 to 11	None	28†
South Carolina.....	149 to 73	None	4
New Hampshire.....	57 to 46	None	16
Virginia.....	89 to 79	20	20
New York.....	30 to 27	32	24
North Carolina.....	193 to 75	20	26
Rhode Island.....	34 to 32	21	18
Vermont.....	105 to 4	None	None
	<hr/> 1175 to 578	<hr/> 93	<hr/> 145
*Harrisburg Convention.....		14	61
† Demanded by the Minority.			

## CHAPTER VI.

### THE FIRST TEN AMENDMENTS.

Just before the adjournment of the House of Representatives, on the fourth of May, 1789,<sup>1</sup> Madison gave notice<sup>2</sup> that he intended to bring forward the subject of amendments to the Constitution, on the twenty-fifth; but the eighth of June had come, when, rising in his place, and reminding the members of his sense of duty to his constituents in proposing them, he moved to go into committee of the whole on the business.<sup>3</sup> That amendments should be proposed at an early date had been insistently and quite confidently demanded by eight States. The two hundred amendments and more, which, in one form or another, represented the demands of the Anti-Federalists, were, taken together, an embodiment of public sentiment which the new government could not prudently ignore. Long before the fate of the Constitution was

<sup>1</sup> The legislative record of the first twelve amendments is found in the Annals of Congress, 1789-1804, excepting the Annals for 1795-1796. The full title of the Annals is "The Debates and Proceedings in the Congress of the United States; with an Appendix, containing important State Papers and Public Documents and all the Laws of a Public Nature" and, for the period of the amendments, consist of ten octavo volumes, published at Washington, by Gales and Seaton, 1834-1852. I have cited them by their short title; the year and subject matter indicate the volume.

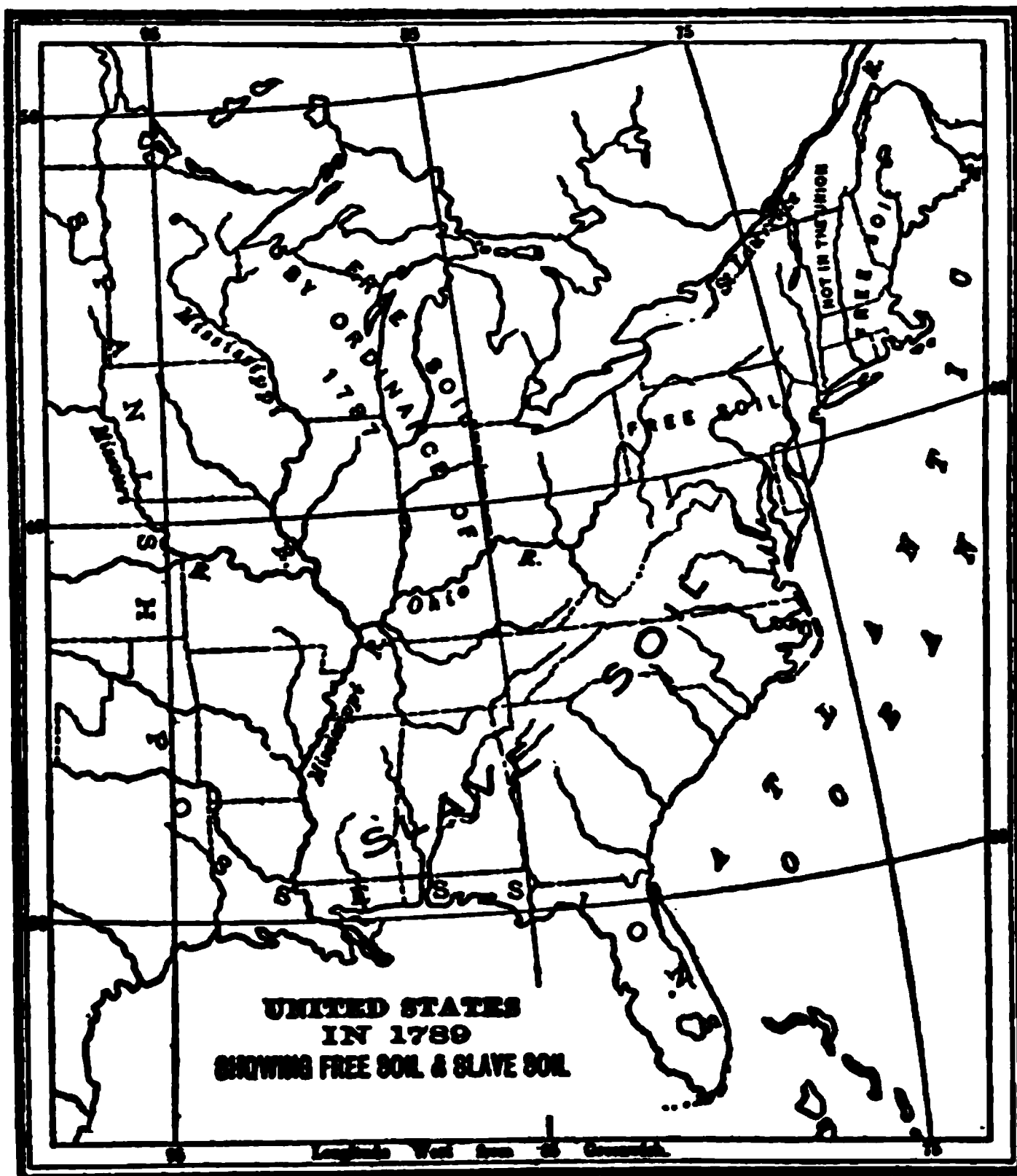
<sup>2</sup> Annals, 257.

#### \* AMENDMENTS OF 1789.

First Draft as Proposed by James Madison, June 8. (Annals, 451-453.)

##### I. (Amending the preamble by prefixing:)

All power is originally vested in and consequently derived from the people (1); Government is instituted and ought to be exercised for the benefit of the people (2) which consists in the en-



joyment of life and liberty, with the right of acquiring and using property, and, generally, of pursuing and obtaining happiness and safety (3); the people have an indubitable, unalienable and indefeasible right to reform or change their Government, whenever it be found inadequate to the purposes of its institution (4). We the People of the United States, &c., &c., &c.

**Precedents:**

**(1) Declaration of Independence, July 4, 1776.**

**State Constitutions:**

1776, New Jersey, Preamble; Maryland, I; Virginia, Bill of Rights, Sec. 2; Pennsylvania, IV.;

North Carolina, I.;

1777, Vermont, I. 5.; New York, Preamble,

1780, Massachusetts, Preamble and V.;

1784, New Hampshire, I.;

1786, Vermont, I. VI.

**Amendments by Ratifying Conventions:**

1788, Virginia, June 27, Bill of Rights proposed, Sec. 2. Robertson's Debates, 471.

North Carolina, August 1, Declaration of Rights proposed December 2, Documentary History of the Constitution, Vol. II., p. 266, also in Elliot, IV. 243.

**(2) Declaration of Independence, July 4, 1776.**

**State Constitutions:**

1776, New Jersey, Preamble; Virginia, Bill of Rights, Sec. 3.; Pennsylvania, V.; Maryland, I.

1777, Vermont, Preamble and I. 6.; New York, Preamble;

1784, New Hampshire, I. 1.;

1786, Vermont, Preamble, and I. 7.

**Amendments by Ratifying Conventions:**

1788, Virginia, Bill of Rights proposed, June 27, Sec. 3. Robertson, 471.

North Carolina, August 1, Declaration of Rights proposed, Sec. 3., Elliot, IV. 243.

**(3) Declaration of Independence, July 4, 1776.**

**State Constitutions:**

1776, Pennsylvania, I.; Virginia, Bill of Rights, Sec. 1.

1777, Vermont, I. 1.;

1780, Massachusetts, Declaration of Rights, I.;

1784, New Hampshire, I. 1.;

1786, Vermont, I. 1.

**Amendments by Ratifying Conventions:**

1788, Virginia, Bill of Rights proposed, Sec. 1.

North Carolina, Declaration of Rights proposed, Sec. 1.

**(4) Declaration of Independence, July 4, 1776.**

**State Constitutions:**

1776, Virginia, Bill of Rights, Sec. 3.; Maryland, IV. Pennsylvania, V.

1777, Vermont, I. 6.; New York, Preamble.

1780, Massachusetts, Preamble and Declaration of Rights, VII.

1786, Vermont, I. 7.

**Amendments by Ratifying Conventions:**

1788, Virginia, Bill of Rights proposed, Sec. 3.

North Carolina, Bill of Rights proposed, Sec. 3.

**II. (Amending Art. I. Sec. 2., Cl. 3.)**

Strike out,—“The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative; and until such enumeration shall be made,”

and insert,

After the first actual enumeration, there shall be one Representative for every thirty thousand, until the number amounts to . . . . ., after which the proportion shall be regulated by Congress, that the number shall never be less than . . . . ., nor more than . . . . ., but each State shall, after the first enumeration, have at least two Representatives; and prior thereto;

remainder of clause unchanged.

**Precedents:**

**Amendments by Ratifying Conventions:**

1787, Pennsylvania, McMaster and Stone's "Pennsylvania and the Federal Convention,"

Amend. by Harrisburg Conference, No. II. p. 562. See also No. 10, p. 462, (Dissenting Reasons of the Minority.)

1788, Massachusetts, February 6, Amend. 2, Elliot, II. 177, or Journal of Mass. Convention.

(Ed. 1856) 83.

Virginia, Amend. 2. Elliot, III. 650, or in Robertson, 473.

New York, Amend. 1. Doc. Hist. II., Department of State, 196.

North Carolina, Amend. No. 2. Elliot, IV. 249.

New Hampshire, Amend. No. 2. Doc. Hist. II., p. 142.

### III. (Amending Art. I., Sec. 6., Cl. 1.)

Change so as to read,—

The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States, but no law varying the compensation last ascertained shall operate before the next ensuing election of Representatives.

#### Precedents:

##### Amendments by Ratifying Convention:

1788, Virginia, No. 18. Robertson, 475, or Elliot, III, 661.

New York, No. 13. Doc. Hist. II. Department of State, 199.

North Carolina, No. 5. Elliot, IV. 249. or Doc. Hist. II. 273.

### IV. (Amending Art. I., Sec. 9. by inserting ten new clauses between Nos. 3 and 4.)

(1) The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.

#### Precedents:

##### State Constitutions:

1776, New Jersey, XVIII.; Pennsylvania, II.; Delaware, 29.; Virginia, 16.; North Carolina, XIX.

1777, Vermont, I. 3.; Georgia, LVI.

1780, Massachusetts, Declaration of Rights, Art. II.

1784, New Hampshire, I. 4. 5.

1786, Vermont, I. 3.

1789, Georgia, IV. 5.

##### Amendments by Ratifying Conventions:

1787, Pennsylvania, McMaster and Stone, 421, 461.

1788, Virginia, Declaration of Rights proposed, No. 20. Elliot, III. 659. Robertson, 472.



North Carolina, Declaration of Rights proposed, No. 20. Doc. Hist. II., 269.

Elliot, IV., 244.

New Hampshire, Amend. No. 11. Doc. Hist. II., 143.

- (2) The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.

**Precedents:**

**State Constitutions:**

1776, Pennsylvania, XII., also Sec. 35.; Maryland, XXXVIII.; Virginia, 12.; North Carolina, XV.

1777, Vermont, I. 14.; Georgia, LXI.

1780, Massachusetts, Declaration of Rights, XVI.

1784, New Hampshire, I. 24.

1786, Vermont, I. 15.

**Amendments by Ratifying Conventions:**

1787, Pennsylvania, McMaster and Stone, 422, 462.

1788, Maryland, Amend. 12. Elliot, II. 552.

Virginia, No. 16. of proposed Declaration of Rights, Elliot, III., 659.

North Carolina, Declaration of Rights proposed, No. 16. Doc. Hist. II., 269.

1787, Federal Convention, August 20.

Elliot V., 445.

proposed by Pinckney.

"Liberty of the Press."

- (3) The people shall not be restrained from peaceably assembling for their common good; nor from applying to the Legislature by petitions, or remonstrances, for redress of their grievances.

**Precedents:**

Petition of Right, 3 Car. 1.

Declaration of Rights, October 19, 1765, Secs. 2., 12.

**State Constitutions:**

1776, Pennsylvania, XVI.; North Carolina, XVIII.

1777, Vermont, I., 18.

1780, Massachusetts, XIX.

1784, New Hampshire, I., 32.

1786, Vermont, I., 22.

**Amendments by Ratifying Conventions:**

1788, Virginia, Declaration of Rights proposed, No. 15. Elliot, III., 659.

North Carolina, Declaration of Rights, No. 15. Doc. Hist. II., 269.

- (4) The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.

**Precedents:**

Declaration of Independence, July 4, 1776.

**State Constitutions:**

1776, North Carolina, XVII.; Virginia, 13.; Pennsylvania, VIII., XIII.

1780, Massachusetts, Declaration of Rights, XVII.

1784, New Hampshire, I. 13.

1786, Vermont, I. 18. Same as I. 15. of constitution of 1777.

**Amendments by Ratifying Conventions:**

1787, Pennsylvania, McMaster and Stone, 422, 462, and VIII. on p. 563.

1788, Maryland, 13. Elliot, II., 552.

Virginia, proposed Declaration of Rights, No. 18. Elliot, III., 659.

New York, Doc. Hist. II., 202.

North Carolina, Doc. Hist. II., 269.

- (5) No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor at any time, but in a manner warranted by law.

**Precedents:**

Declaration of Independence, July 4, 1776.

See also Petition of Right, 3 Car. I., 10. 11.

**State Constitutions:**

1776, Maryland, XXVIII.

1777, New York, Preamble.

1780, Massachusetts, Declaration of Rights, XXVII.

1784, New Hampshire, I., 27.

**Amendments by Ratifying Conventions:**

1787, Pennsylvania, McMaster and Stone, 422, No. 7.; 462, No. 7.

1788, Maryland, No. 10. Elliot, II., 552.

New Hampshire, No. 10. Doc. Hist. II., p. 143.

Virginia, proposed Declaration of Rights, No. 18. Elliot, III., 659.

North Carolina, Declaration of Rights proposed, No. 18. Doc. Hist. II., 269.

1787, Federal Convention, August 20.

Elliot, V., 445.

Proposed by Pinckney.

- (6) No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty or property, without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without just compensation.

**Precedents:**

Magna Charta, (1215) 39., and confirmations of the same. See Laws of Rhode Island, 1663; of North Carolina, (Martin's Laws) 1792, in which the earlier confirmations are cited.

**State Constitutions:**

1776, Pennsylvania, VIII.; Maryland, XVI.

1777, Vermont, I., 10.

1780, Massachusetts, Declaration of Rights, XII., XV.

1784, New Hampshire, I., 15, 16.

1786, Vermont, I., 11.

**Amendments of Ratifying Conventions:**

1788, Maryland, No. 2. Elliot, II., 550.

North Carolina, Nos. 8, 9, 10, 11, 12. Doc. Hist. II., 267-8.

- (7) Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

**Precedents:**

Bill of Rights, 1689, I. Wm. and Mary.

Confirmation of same by Colonial Assemblies, e. g., New York, 1689.

Declaration of Rights, 1765, October 19, Secs. 2. 12.

**State Constitutions:**

1776, Pennsylvania, 29.; Maryland, XIV., XXII.; Virginia, 9.; North Carolina, X.

1777, Georgia, LIX.

1784, New Hampshire, I., 23.

**Amendments by Ratifying Conventions:**

1787, Pennsylvania, McMaster and Stone, 421, 461.

1788, Virginia, proposed Declaration of Rights, No. 13. Elliot, III., 658.

North Carolina, proposed Declaration of Rights, No. 13. Doc. Hist. II., 268.

- (8) The rights of the people to be secured in their persons, their houses, their papers and their property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.

**Precedents:**

Declaration of Independence, July 4, 1776.

**State Constitutions:**

1776, Pennsylvania, X.; Maryland, XXIII.; Virginia, 10.; North Carolina, XI.

1777, Vermont, I., 11.

1780, Massachusetts, Declaration of Rights, XIV.

1784, New Hampshire, I. 19.

1786, Vermont, I. 12.

**Amendments by Ratifying Conventions:**

1787, Pennsylvania, McMaster and Stone, 421, 461.

North Carolina, No. 14, Doc. Hist. II., 268.

Virginia, No. 14, Elliot, III., 658.

- (9) In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, to be informed of the cause and nature of the accusation, to be confronted with his accusers and the witnesses against him; to have a compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

**Precedents:**

Magna Charta, 1215, Sec. 40.

Confirmations of the same (see note to (6) supra.)

Petition of Right, 1628, 10.

Declaration of Rights, October 19, 1765. Secs. 2, 12.

Declaration of Independence, July 4, 1776.

**State Constitutions:**

1776, Pennsylvania, IX.; Maryland, XIX.;

Virginia, 8; North Carolina, VII., VIII., IX., XIII., XIV.

1777, Vermont, I., 10; New York, Preamble.

1780, Massachusetts, Declaration of Rights, X., XII., XV.

1784, New Hampshire, I., 15, 16, 20, 21.

1786, Vermont, I., 11.

**Amendments by Ratifying Conventions:**

1787, Pennsylvania, McMaster and Stone, 421, 461.

1788, Massachusetts, No. 6. Journal, 84.

Maryland, No. 2. Elliot, II., 550.

North Carolina, No. 8. Doc. Hist. II., page 267.

Virginia, No. 8, in Elliot, III., 658, and No. 13, p. 661.

- (10) The exceptions here or elsewhere, in the Constitution, made in favor of particular rights, shall not be construed to diminish the just importance of other rights retained by the people, or, as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or, as inserted merely for greater caution.

**Precedents:**

**State Constitutions:**

1776, Pennsylvania, Sec. 46.

1780, Massachusetts, Part I., IV.

1784, New Hampshire, Bill of Rights, VII.

**Amendments by Ratifying Conventions:**

1787, Pennsylvania, McMaster and Stone, No. I., p. 562.

1788, Massachusetts, Journal, 83.

Maryland, No. I., Elliot, II., 550.

South Carolina, Doc. Hist. II., p. 139.

New Hampshire, No. I., in Doc. Hist. II., p. 142.

Virginia, No. 17, Elliot, III., 661.

North Carolina, No. 1, Doc. Hist. II., p. 270.

- V. (Amending Art. I., Sec. 10, by inserting this clause between Clauses 1 and 2):

No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.

**Precedents:**

**State Constitutions:**

1776, North Carolina, VII., VIII., IX., XII., XIII., XIV., XV., XIX.

Virginia, 8, 11, 12, 16.

Maryland, XVII., XVIII., XIX., XX., XXI.,  
XXIII.

Delaware, 29.

Pennsylvania, 25, 35.

1777, Georgia, LVI., LXI.

Vermont, I., 3, 14, 15, 10, 12, 13.

1782, Massachusetts, Declaration of Rights, II.,  
XIV., XVI.

1784, New Hampshire, I., 4, 5, 14, 16, 17, 20, 21.

1786, Vermont, I., 3, 11, 14, 15.

1789, Georgia, IV., 3, 5.

**Amendments by Ratifying Conventions:**

1787, Pennsylvania, McMaster and Stone, No. 1  
421; No. 1, p. 461.

1788, South Carolina, Res. 3, in Doc. Hist. II., p.  
New Hampshire, No. 11, in Doc. Hist. II.  
143.

Virginia, Declaration of Rights proposed,  
20. Robertson, 473, or Elliot, III.,

North Carolina, Declaration of Rights, No  
Doc. Hist. II., p. 268.

- VI. (Amending Art. III, Sec. 2, by adding to Clause**  
But no appeal to such court shall be allowed w  
the value in controversy shall not amount to —  
dollars; nor shall any fact triable by jury, acc  
ing to the course of common law, be other  
re-examinable than may consist with the princ  
of common law.

**Precedents:**

**Amendments by Ratifying Conventions:**

1787, Pennsylvania, McMaster and Stone, No. 1  
p. 421; No. 2, p. 461.

1788, Massachusetts, No. 7. Journal, 84, or E  
II., 177.

Maryland, Nos. 3 and 4. Elliot, II., 550.

New Hampshire, No. 7. Doc. Hist. II., p.

- VII. (Amend by striking out all of Clauses 3, Sec. 2,  
III., and substitute):**

- (1) The trial of all crimes (except cases of impe  
ment and cases arising in the land or naval fo  
or the militia when on actual service, in tin  
war or public danger) shall be by an impartial  
of freeholders of the vicinage, with the requ  
of unanimity for conviction, of the right of

lenge, and other accustomed requisites; and in all crimes punishable with loss of life or member, presentment by a grand jury shall be an essential preliminary, provided that in cases of crimes committed within any county which may be in possession of an enemy, or in which a general insurrection may prevail, the trial may by law be authorized in some other county of the same State, as near as may be to the seat of the offence.

**Precedents:**

**State Constitutions:**

1776, Pennsylvania, IX.; Maryland, XIX., XX., XXI., XXIV.; Virginia, 8.

1777, Vermont, I., 10, 13.

1780, Massachusetts, Declaration of Rights, XII., XIII., XV.

1784, New Hampshire, I., 14, 15, 16.

**Amendments by Ratifying Conventions:**

1787, Pennsylvania, McMaster and Stone, 461.

1788, Massachusetts, No. 6. Journal, 84.

Maryland, Nos. 2, 3, 5. Elliot, II., 550.

New Hampshire, No. 5, in Doc. Hist. II., etc., p. 142-3.

Virginia, Declaration of Rights proposed, No. 8, 10, 11, Elliot, III., 658; Amend. No. 15. Id. 661.

North Carolina, Declaration of Rights proposed, Nos. 8, 10, 11; Amend. No. 16. Doc. Hist. II., etc., pp. 271-3.

- (2) In cases of crimes committed within any county, the trial may by law be in such county as the laws shall have prescribed. In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate.

**Precedents:**

**State Constitutions:**

1776, Pennsylvania, 25.

1777, Georgia, LXI.

1789, Georgia, IV., 3, 17.

**Amendments by Ratifying Conventions:**

1787, Pennsylvania, McMaster and Stone, No. 2, p. 421; No. 2, p. 461.

1788, Massachusetts, No. 8. Journal, 84.

of the instrument, because he believed that they should come, in a supplementary form, as a body of changes at the close. Madison thought it neater and more proper to incorporate the amendments in their proper places, as this would make their meaning plainer. Smith, of South Carolina, citing the practice of this State when revising its code, supported Madison. Livermore supported Sherman, and referred the House to the practice of the British Parliament, and of the States in amending their constitutions.

Clymer, mindful of the labor of the Federal Convention, urged that its work be left intact and that the amendments be added, at its close. "The world would discover the perfection of the original and the superfluity of the amendments." He did not consider any of them essential, but acquiesced in them because they were asked for by others. "If the amendments are incorporated in the body of the work," remarked Stone, of Maryland, "it will appear, unless we refer to the archives of Congress, that George Washington, and other worthy characters, who composed the Convention, signed an instrument which they never had in contemplation. The one to which he affixed his signature purports to be adopted by the unanimous consent of the delegates from every State there assembled. Now, if we incorporate these amendments, we must undoubtedly go further, and say, that the Constitution, so formed, was defective, and had need of alteration; we therefore repeal the old and substitute a new one in its place. This, perhaps, is not the last amendment the Constitution may receive; we ought therefore to be careful how we set a precedent which, in dangerous and turbulent times, may unhinge the whole," and he concluded by saying that by the terms of the Constitution, Congress had a right to propose amendments, which, when duly



decided, Jefferson had stated his objections to it in a letter to Madison.<sup>1</sup> It was "the omission of a bill of rights providing clearly and without the aid of sophism for freedom of religion, freedom of the press, protection against standing armies, restriction of monopolies, the eternal and unremitting force of the habeas corpus laws, and trials by jury in all matters of fact triable by the laws of the land and not by the laws of nations." That the Constitution,—as Wilson had told the people of Philadelphia,—was "itself a bill of rights," seemed to Jefferson "surety a *gratis dictum*, the reverse of which might just as well be said;" and "opposed by strong inferences from the body of the instrument." He wished "with all his soul," that the first nine conventions would accept the Constitution, and thus secure the good it contained; but the four latest conventions, whichever they might be,

<sup>1</sup> Commenting on the Constitution, Jefferson wrote: "I will now tell you what I do not like. First, the omission of a Bill of Rights providing clearly and without the aid of sophism for freedom of religion, freedom of the press, protection against standing armies, restriction of monopolies, the eternal and unremitting force of the habeas corpus laws, and trials by jury in all matters of fact triable by the laws of the land and not by the laws of nations. To say as Mr. Wilson does (referring to Wilson's speech at the State House, Philadelphia, in defence of the Constitution: See *Pennsylvania and the Federal Constitution*, McMaster and Stone, 9, 252-254), that a Bill of Rights was not necessary, because all is reserved in the case of the General Government, which is not given, while, in the particular ones, all is given which is not reserved, might do for the audience to which it was addressed, but it is surely a *gratis dictum*, the reverse of which might just as well be said; and it is opposed by strong inferences from the body of the instrument."

Jefferson to Madison, Paris, December, 1787,

Works, II, 329. See also his letter to Priestly, June 19, 1802, stating what he had to do with making the Constitution.

Works. (Ford's Ed.) VIII, 159.

should refuse to accede, till a declaration of rights was annexed,<sup>1</sup> and later, he expressed himself greatly pleased with the course of Massachusetts, in accepting the work of the Federal Convention, and amending it afterwards.<sup>2</sup>

Jefferson's devotion to Bills of Rights, as a security for the people, was exceeded by Richard Henry Lee and George Mason's demands for amendments, as a security for the States.<sup>3</sup> To Lee and Mason, the Constitution seemed to authorize a consolidated government, instead of a confederacy: therefore it should be amended, so as to leave the State sovereignties intact. Between Jefferson and Lee stood many lesser leaders, opponents of the Constitution, who demanded amendments of particular provisions, such as those regulating the apportionment of representation; the election of Senators and Representatives; the tenure of office, the publication of the journals of Congress; the jurisdiction of federal courts, and other administrative details. Of the moderate men of this party, Madison was chief, and he devoted himself to an exhaustive study of all the amendments proposed by the State conventions, and of all the grievances and com-

<sup>1</sup> On amending the Constitution, Jefferson wrote:

"I wish, with all my soul, that the nine first conventions may accept the new Constitution, because this will secure to us the good it contains, which I think great and important. But I equally wish that the four latest conventions, whichever they may be, may refuse to accede to it till a declaration of rights be annexed."

Jefferson to A. Donald, February 7, 1788.

Works, I, 355.

The same idea is repeated by him in other letters.

Jefferson objected to the re-eligibility of the President.

Letter to Washington, May 2, 1788. Works, II, 375.

<sup>2</sup> Jefferson commended the course of Massachusetts in accepting the Constitution and demanding amendments.

Letter to W. Carmichael, May 27, 1788. Works, II, 399.

<sup>3</sup> See Mason's Objections to the Federal Constitution and Iredell's Observations on them, in Ford's Pamphlets, 327, 333.

plaints of the newspapers and the talk of the day. Finally as "the fruit of much labor and research," he introduced his long expected list.<sup>1</sup>

It was preceded, on the fifth of May, by the petition of the general assembly of Virginia, presented by Bland,<sup>2</sup> requesting Congress to call a second convention, immediately, with full power to take into consideration the amendments that had been suggested by the State conventions, and to report them for ratification. The Virginia petition was largely the outgrowth of the New York Circular Letter.<sup>3</sup> Bland wished the request referred to a

<sup>1</sup> "Mr. Madison has introduced his long-expected amendments. They are the fruit of much labor and research. He has hunted up all the grievances and complaints of newspapers, all the articles of conventions and the small talk of their debates. It contains a bill of rights, the right of enjoying property, of changing government at pleasure, freedom of the press, of conscience, of juries, exemption from general warrants, gradual increase of representatives, till the whole number at the rate of one to every thirty thousand shall amount to ———, and allowing two to every State at least. This is the substance. There is too much of it. I had forgot the right of the people to bear arms.

"Risum teneatis amici?

"Upon the whole it may do some good towards quieting men who attend to sounds only, and may get the mover some popularity which he wishes."

Fisher Ames to Th. Dwight, June 11, 1789.

Life and Works of Ames, I, 52.

Writing of the amendments as a whole: "It is rather food than physic. An immense mass of sweet and other herbs and roots for diet drink."

Ames to George R. Minot, June 12, 1789.

Life, I, 54.

For Madison's Amendments, the first draft of those ultimately adopted, see p. 199.

<sup>2</sup> Annals, 258, 259.

See letter of Richard Henry Lee to Bland, urging amendments; stating that they were probable by means of the new Congress, and that they were expected. Letter to Bland, Oct. 15, 1788.

Lee's Lee, II, 95.

<sup>3</sup> See ante, pp. 149, 151, 152.

committee of the whole on the state of the Union, but Boudinot, Madison, Huntington and some others, were of opinion that the business could not be taken up, constitutionally, until two-thirds of the State legislatures had concurred in the application. At the suggestion of Page, of Virginia, the application, and all similar ones, until sufficient were made to obtain their object, were ordered to be entered on the journal,—the originals being filed among the records of Congress. But the probability that two-thirds of the States would take the initiative in securing amendments was not great, though the subject had been one of general agitation. The initiative was to come from Congress and was to be taken by Madison, but he could not get his propositions before the House, until one question of procedure and another of expediency had been first settled. The revenue bill was under consideration;—should it be dropped to take up amendments to the Constitution? Again, should the amendments proposed by the State conventions be referred first to a select committee, and thus expedite business? Did not the Constitution explicitly provide that, whenever two-thirds of both Houses might deem it necessary, Congress should propose amendments? Therefore, the consent of two-thirds must first be obtained. This number must first decide the question of expediency. Madison urged expedition, that the public might be satisfied, for it had demanded amendments and expected Congress to propose them at an early day. He said that they would “give satisfaction to the doubting part of our fellow-citizens,” who had an apprehension that the public liberties were not secure. Pass the amendments and the doubtful would “join their support to the cause of Federalism.” But the strong motive in Madison’s mind was to bring Rhode Island and North Caro-

lina into the Union. Not a single proposition would he suggest that would be unlikely to meet the concurrence of two-thirds of both Houses and the approbation of three-fourths of the State legislatures. "There have been objections of various kinds, made against the Constitution," said he. "Some are leveled against its structure, because the President is without a council; because the Senate, which is a legislative body, has judicial powers in trials on impeachments; and because the powers of that body are compounded in other respects, in a manner that does not correspond with a particular theory; because it grants more power than is supposed to be necessary for every good purpose, and controls the ordinary powers of the State governments. I know some respectable characters who opposed this Government on these grounds; but I believe that the great mass of the people who opposed it disliked it because it did not contain effectual provisions against encroachments on particular rights and those safeguards which they have been long accustomed to have interposed between them and the magistrate who exercises the sovereign power; nor ought we to consider them safe, while a great number of our fellow citizens think these securities."<sup>1</sup>

Madison's plan was to incorporate the amendments in the Constitution,<sup>2</sup> in their proper places, and not to add them, in a body, at the close. He therefore submitted his changes, omissions, and additions, indicating where each should be made. All, he said, were in the nature of a Bill of Rights. The British Declaration of 1689 had gone no further than to raise barriers against the power of the Crown. The power of the legislature was left altogether indefinite. Even *Magna Charta* did not secure

<sup>1</sup> *Annals*, 450.

<sup>2</sup> *Annals*, 451-453.

than increase," answered Ames; "the House of Representatives will furnish a better check upon the Senate, if filled with men of independent principles, integrity and eminent abilities, than if consisting of a numerous body of inferior characters."

If the United States contained three millions of people, Stone reminded Ames, one representative for every thirty thousand would give a hundred members, of whom fifty-one would be a quorum to do business; twenty-six would be a majority—and give law to the United States, together with seven in the Senate.<sup>1</sup> This was certainly a sufficiently small number to administer the government. Would any one, upon mature reflection, think it expedient to reduce it by one-fourth? Ames' amendment was rejected by a large majority. Sedgwick then moved to fix the number at two hundred, instead of one hundred and seventy-five, because, otherwise, the body would be "rather too small to represent such extensive concerns." "In the Convention that framed the Constitution," said Sherman, perhaps forgetting for the moment the oath of secrecy he had taken, respecting its proceedings, "there was a majority in favor of forty thousand; and though there were some in favor of thirty thousand, yet that proposition did not obtain until after the Constitution was agreed to, when the President had expressed a wish that thirty thousand should be inserted as more favorable to the public interest,<sup>2</sup> during the contest between thirty and forty thousand, there were not more than nine States, as he remembered, who voted in favor of the former. The objects of the federal government were fewer than those of the State governments; they did not require an equal degree of local knowledge. The only case, perhaps,

<sup>1</sup> *Annals*, 752.

<sup>2</sup> *Elliot*, V, 555; *Documentary History III*, 764.

residuum being the rights of the people. But a clause gave to Congress the power to make all laws which shall be necessary and proper for carrying the powers of the Government into execution. This made Congress the final judge. Suppose that Congress decided to collect its revenue by general warrants; what limit was there to its action? The State constitutions forbade such warrants and the federal government should be subject to a like restraint. It was said that a Bill of Rights was unnecessary because the Constitution had not repealed the Bills which prefaced many of the State constitutions. This, however, was leaving a right on too uncertain ground. Some States had no Bill of Rights; others had Bills some of whose clauses were absolutely improper, because they limited liberty, in an arbitrary fashion. Again, a Bill of Rights was objectionable because, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not included in the enumeration, and, it might follow by implication, that those rights which were not singled out were intended to be assigned into the hands of the general government, and therefore, were insecure.

This plausible argument had many supporters, and, to guard against it, Madison brought forward as a new clause, that exceptions in the Constitution, made in favor of particular rights, should not be construed so as to diminish the just importance of other rights retained by the people, or to enlarge the powers delegated by the Constitution; but should be understood to be actual limitations of such powers, or to have been inserted merely for greater caution. He took his amendment from one sent up by the Virginia convention, and another, in similar language, proposed by the Harrisburg Conference. But were amendments necessary? They had not proved effectual

in the State constitutions. If incorporated in the supreme law of the land, independent tribunals of justice would construe them and thus contribute to guard the people against usurpations of power by the executive, or the legislative. The watchfulness of the State legislatures, and their jealousy and rivalry, would tend to enforce a federal Bill of Rights. Even the greatest opponents of the federal government admitted that the State legislatures were the trustworthy guardians of popular liberty.

The Constitution should be revised in its provision for the apportionment of representatives. It was the sense of the people, as shown by the ratifying conventions, that the number of representatives should be increased, but not be subject to decrease, at the will of Congress,—below a minimum. Congress, as population increased, might make the House of Representatives an unwieldy number. The possibility was a dangerous defect in the instrument and ought to be remedied. Another defect was the article which left to Congress the power to fix its own compensation,—a power greatly liable to abuse. It should be impossible, that any increase should benefit the legislature that made it. The limitations forbidding the States to pass bills of attainder or *ex post facto* laws were eminently wise. Without doubt, there was a greater danger of the abuse of these powers by the States than by the United States; but the same might be said of other rights; therefore the limitation should include the rights of conscience, freedom of the press, and trial by jury in criminal cases. Some State constitutions contained these provisions, but the protection should be general.

As the public mind was not satisfied with the article on the judiciary, because great inconvenience might befall



suitors who, to obtain justice in the Supreme Court of the United States, would be forced to travel great distances upon an appeal, on an action for a small debt, the Constitution should be amended so as to declare that no appeal could be made unless the matter in controversy amounted to a minimum sum. After looking into the amendments, proposed by the conventions, Madison found several States particularly anxious that it should be declared in the Constitution that the powers not therein delegated were reserved by the several States. If the fact was as some of the conventions stated, the provision might not be superfluous. Having thus gone through his proposed amendments, he moved for their reference to a Select Committee, which might have them under consideration, get them into form and report them; meanwhile the House could proceed with other business before it.<sup>1</sup>

But many members differed with Madison as to the urgency of amendments. Jackson, of Georgia, thought that other business, particularly the revenue bill, was more pressing, and, moreover, that the advocacy of amendments was a confession from Congress of danger to the public interests which did not exist. The representatives returned to private life every two years,—a sufficient security against encroachments. Surely the people of Rhode Island were under greater danger of an abuse of power by their legislature than by Congress. As soon as Rhode Island and North Carolina joined the Union, there would be another list of amendments to consider. Why propose any while yet without experience? Perhaps the parts of the Constitution which it was proposed to alter might prove the most valuable of the whole.<sup>2</sup> Gerry, who had given many reasons to the Federal Con-

<sup>1</sup> *Annals*, 453-459.

<sup>2</sup> *Annals*, 460.

national, showed that he considered the word implied a consolidated government.<sup>1</sup>

Madison quickly withdrew his motion, observing that the words "no national religion shall be established by law" did not imply that the government was a national one. At this Livermore's amendment of the phraseology was adopted, that "Congress shall make no laws touching religion, or infringing the rights of conscience."<sup>2</sup> And thus the perils of a prolonged discussion,—whether the government was national or federal,—were avoided.

The provisions, common to the State constitutions, securing freedom of the press, the right of petition, and, in a few States, freedom of speech, had schooled most of the members into familiarity with the next clause, embodying the provisions and now proposed as part of the third amendment.<sup>3</sup> Sedgwick promptly criticised it as descending too much into minutia and thus making the House appear trifling to its constituents. Tucker fell back on the request of Virginia and North Carolina that the amendment be made. Gerry cited the State constitutions, though the abuse of rights in Massachusetts persuaded some against the clause. Sedgwick thought the word "consult" superfluous and moved that it be struck out. Tucker wished to insert the words, "to instruct their Representatives." A long debate followed on the question of instruction,<sup>4</sup> Page asserting that instruction and representation went together in a republic. But Clymer declared the idea dangerous and utterly destructive of all thought of an independent and deliberative body, and Sherman agreed with him. "When the people

<sup>1</sup> Annals, 759.

<sup>2</sup> Annals, 759.

<sup>3</sup> For the clause see p. 204.

<sup>4</sup> Annals, 761-766.

Those which have not recommended alterations will hardly adopt them, unless it is clear that they tend to make the Constitution better. Now, how this can be made out to their satisfaction I am yet to learn; they know of no defect from experience."<sup>1</sup> In saying this he merely repeated sentiments which he had expressed when the Constitution was before the State conventions. Nor was Sherman's appeal,—that Congress bide the test of experience,—confined to a narrow circle, or a lower order of minds. It was the appeal of the conservatives throughout the country. The Federalists demanded that the Constitution be given a fair trial before attempts be made to amend it. Fisher Ames did not hesitate to say that Madison's object in moving the amendments was merely to gain popularity.<sup>2</sup> Washington was for peace and harmony and was known to be ready to embrace any tolerable compromise. The great body of Federalists considered amendments untimely, somewhat presumptuous, and quite needless.<sup>3</sup>

The House finally decided to refer the amendments to a Committee of the Whole, but this seemed a tedious solu-

<sup>1</sup> *Id.*, 465.

<sup>2</sup> Ames to Dwight, *supra*.

<sup>3</sup> "Doubtless there are defects in the proposed system which may be remedied in a constitutional mode. I am truly pleased to learn that those who have been considered as its most violent opposers will not only acquiesce peaceably but so co-operate in the organization and content themselves with asking amendments in the manner prescribed by the Constitution."

Washington to Charles Pettit, August 16, 1788.

Works (Ford's Ed.), XI, 299.

"The merits and defects of the proposed constitution have been largely and ably discussed. For myself, I was ready to have embraced any tolerable compromise that was competent to save us from impending ruin; and I can say there are scarcely any of the amendments which have been suggested, to which I have much objection, except that which goes to the prevention of direct

tion of the problem, and Ames, Sedgwick and Jackson again urged reference to a Select Committee; Ames, on the twenty-first, declaring that such a committee, in arranging so complex a business, would be like the senses to the soul. A public discussion of the Constitution taxation. And that, I presume, will be more strenuously advocated and insisted upon than any other."

Washington to Jefferson, August 31, 1788.

Works (Ford's Ed.), XI, 321.

"I wish to have no amendments made these twenty years, or not until by experience and good judgment we should be able to discern what amendments are necessary. The Constitution is so good and excellent that I do not wish to have it shaken by any speedy alterations. However desirous a number of States may be for a speedy convention and revision, I wish it may be evaded and put off until we are, as a public, able to judge upon experiment."

President Stiles to William Samuel Johnson, April 13, 1789; Beardsley's Johnson, 135..

"On the whole, it is hoped that all the States will consent to make a trial of the Constitution, before they attempt to alter it; experience will but show whether it is deficient or not; on trial it may appear that the alterations that have been prepared are not necessary, or that others not yet thought of are necessary; everything that tends to disunion ought to be avoided."

Roger Sherman, "Observations on Proposed Amendments."

Boutell's Sherman, 177; Ford's Pamphlets, 233.

"The opponents in the States to the Constitution decrease and grow temperate. More of them seem to look forward to another Convention, rather as a measure that will justify their opposition than produce all the effects they pretended to expect from it. I wish that measure may be adopted with a good grace and without delay or hesitation. So many good reasons may be assigned for postponing the session of such a convention for three or four years that I believe the great majority of its advocates would be satisfied with that delay; after which I think we should not have much danger to apprehend from it, especially if the new Government should in the meantime recommend itself to the people by the wisdom of their proceedings, which I flatter myself will be the case."

John Jay to Washington, September 21, 1788.

Johnston's Jay, III, 360.

would be like a dissection of it,—the destruction of its symmetry. Ames's chief objection was the delay of public business which a discussion of the amendments in committee of the whole would cause. Finally, by a vote of more than two to one, Madison's amendments were referred to a Select Committee of One from each State.<sup>1</sup> Of the eleven appointed, Madison, Baldwin, Sherman, Gilman and Clymer had been members of the Federal Convention. Vining, of Delaware, was chairman; Edanus Burke, of North Carolina; Egbert Benson, of New York; Robert Goodhue, of Massachusetts; Elias Boudinot, of New Jersey, and George Gale, of Maryland, completed the list.<sup>2</sup>

On the thirteenth of August, the Select Committee of Eleven reported.<sup>3</sup> Madison's amendments were preserved in substance, with verbal changes, but were cut down from twenty clauses to eighteen. The membership of the House was fixed at not less than one hundred, nor more

<sup>1</sup> "We had the amendments on the tapis and referred them to a committee of one from a State. I hope much debate will be avoided by this mode and that the amendments will be more rational and less ad populum than Madison's. It is necessary to conciliate and I would have amendments. But they should not be rash, such as would dishonor the Constitution, without pleasing its enemies. Should we propose them, North Carolina would accede. It is doubtful in case we should not."

Ames to George R. Minot, July 23, 1789.

Life of Ames, I, 65.

"A few milk-and-water amendments have been proposed by Mr. M., such as liberty of conscience, a free press, and one or two general things already well secured. I suppose it was done to keep his promise with his constituents, to move for alterations; but, if I am not greatly mistaken, he is not hearty in the cause of amendments."

Pierce Butler to James Iredell, August 11, 1789,

McRee's Iredell, II, 265.

<sup>2</sup> Annals, 691.

<sup>3</sup> Annals, 734-790.

## REPORT OF THE COMMITTEE OF ELEVEN, AUGUST 13.

## Second Draft of the Amendments of 1789.

- { Annals, 733-790.
- { House Journal, 85, et seq.
- { Senate Journal, 71, et seq.

## I. (Amending the Preamble.)

Government being intended for the benefit of the people, and the rightful establishment thereof, being derived from their authority alone,

"We, the People of the United States," etc., etc.

## II. (Amending Art. I, Sec. II, Cl. 3.)

After the first enumeration there shall be one representative for every thirty thousand until the number shall amount to one hundred. After which the proportion shall be so regulated by Congress that the number of representatives shall never be less than one hundred, nor more than one hundred and seventy-five; but each State shall always have at least one representative.

(House Journal, 85, 121; Senate Journal, 69.)

## III. (Amending Art. I, Sec. 6, Cl. 1.) Making it read:

The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States, but no law varying the compensation shall take effect until an election of representatives shall have intervened.

(House Journal, 85, 121; Senate Journal, 70.)

## IV. (Amending Art. I, Sec. 9, by inserting eight new clauses between 3 and 4.)

- (1) No religion shall be established by law, nor shall the equal rights of conscience be infringed.
- (2) The freedom of speech and of the press and the right of the people peaceably to assemble and consult for their common good, and to apply to the Government for redress of grievances, shall not be infringed.
- (3) A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms.

(House Journal, 85, 121; Senate Journal, 71, 77).

- (4) No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

(House Journal, 85; Senate Journal, 71).

- (5) No person shall be subject, in case of impeachment, to more

than one trial or one punishment for the same offence, nor shall be compelled to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

(House Journal, 85, 121; Senate Journal, 71, 77).

- (6) Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

(House Journal, 85; Senate Journal, 72).

- (7) The right of the people to be secured in their persons, houses, papers and effects, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched and the persons or things to be seized.

(House Journal, 85; Senate Journal, 71).

- (8) The enumeration in this Constitution of certain rights shall not be construed to disparage others retained by the people.

V. (Amending Art. I, Sec. 10, by inserting between the first and the second paragraphs a new paragraph.)

No State shall infringe the equal rights of conscience, nor the freedom of speech or of the press, nor of the right of trial by jury in criminal cases.

VI. (Amending Art. III, Sec. 2, by adding to the second paragraph:)

But no appeal to such court shall be allowed where the value in controversy shall not amount to one thousand dollars; nor shall any fact, triable by a jury according to the course of the common law, be otherwise re-examinable than according to the rules of the common law.

VII. (Amending Art. III, Sec. 2, by striking out the third paragraph and inserting:)

- (1) In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

(House Journal, 85, 121; Senate Journal, 71, 88).

- (2) The trial of all crimes (except in cases of impeachment, and in cases arising in the land and naval forces, or in the militia when in actual service in the time of war, or public danger) shall be by an impartial jury of freeholders of the vicinage, with the requisite unanimity for conviction, the right of challenge, and other accustomed requisites; and

than one hundred and seventy-five. Appeals to the Supreme Court were not to be allowed, unless the value in controversy should amount to one thousand dollars. These particulars filled the blanks in Madison's amendments. The ten clauses to his fourth amendment were reduced to eight and the general style of the whole was improved. Madison wished to get the clauses through with as little debate as possible.<sup>1</sup> The House, on Boudinot's motion,

no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment, or indictment, by a grand jury; but if a crime be committed in a place in the possession of an enemy, or in which an insurrection may prevail, the indictment and trial may by law be authorized in some other place within the same State; and if it be committed in a place not within a State, the indictment and trial may be at such place or places as the law may have directed.

(3) In suits at common law, the right of trial by jury shall be preserved.

(House Journal, 86, 121; Senate Journal, 72, 77).

VIII. (Amending Art. VI by inserting as Art. VII:)

The powers delegated by this Constitution to the Government of the United States shall be exercised as therein appropriated, so that the Legislative shall not exercise the powers vested in the Executive or Judicial; nor the Executive the power vested in the Legislative or Judicial; nor the Judicial the powers vested in the Legislative or Executive.

IX. The powers not delegated by the Constitution, nor prohibited by it to the States, are reserved to the States respectively.

X. (Amend by making Art. VII Art. VIII.)

<sup>1</sup> Madison believed in adding amendments to the Constitution as "Measures which will conciliate the well-meaning of all parties and put our affairs into an auspicious train." And he speaks of Congress as "containing a majority of friends to the Federal Constitution" who would be the means of "securing it against the hazardous experiment of a second Convention."

Madison to Jefferson, December 12, 1788.

Works, I, 446.

The amendments thought necessary by Madison were to secure the rights of conscience; freedom of the press; trial by jury; security against general warrants; periodical increase of repre-



went into Committee of the Whole, and the discussion of the amendments began. Sherman objected to the introduction which Madison proposed to make to the Preamble, because it interwove disconnected matter with the original. Had Congress the right to introduce new matter? The Constitution was the work of the people and ought to remain entire. The amendments would be the act of the State governments. All authority possessed by Congress came from the Constitution and to change it was to remove the foundations on which Congress rested. Sherman objected to the insertion of amendments in the body

sentatives; and to make vexatious appeals to the Federal judiciary impossible. The reasons why Congress and not a Convention should propose them were because the Congressional means was most expeditious, certain and safe. A Convention would alarm the country, as parties stood.

Madison to George Eve, January 2, 1789.

Works, I, 447-8.

On the method of amending the Constitution, Madison wrote: "They will be attempted in no other way than through Congress. Many of the warmest of the opponents of the Government disavow the mode contended for by Virginia."

Letter to Edmund Randolph, April 12, 1789.

Works, I, 463.

Of the character of the amendments, Madison wrote: "They are restrained to points on which least difficulty was apprehended. Nothing of a controvertible nature ought to be hazarded by those who are sincere in wishing for the approbation of two-thirds of each House and three-fourths of the State Legislatures."

Letter to Edmund Pendleton, June 21, 1789.

Works, I, 479. See also letter to Jefferson, June 30, 1889. Ib. 485.

Writing to his father, Madison hopes that the amendments "will satisfy moderate opponents."

Letter to Col. Joseph Madison, July 5, 1789.

Works, I, 486.

"Absolutely necessary to abbreviate debate and exclude every proposition of a doubtful or unimportant nature."

Madison to Edmund Randolph, August 21, 1789.

Works, I, 490.

of the instrument, because he believed that they should come, in a supplementary form, as a body of changes at the close. Madison thought it neater and more proper to incorporate the amendments in their proper places, as this would make their meaning plainer. Smith, of South Carolina, citing the practice of this State when revising its code, supported Madison. Livermore supported Sherman, and referred the House to the practice of the British Parliament, and of the States in amending their constitutions.

Clymer, mindful of the labor of the Federal Convention, urged that its work be left intact and that the amendments be added, at its close. "The world would discover the perfection of the original and the superfluity of the amendments." He did not consider any of them essential, but acquiesced in them because they were asked for by others. "If the amendments are incorporated in the body of the work," remarked Stone, of Maryland, "it will appear, unless we refer to the archives of Congress, that George Washington, and other worthy characters, who composed the Convention, signed an instrument which they never had in contemplation. The one to which he affixed his signature purports to be adopted by the unanimous consent of the delegates from every State there assembled. Now, if we incorporate these amendments, we must undoubtedly go further, and say, that the Constitution, so formed, was defective, and had need of alteration; we therefore repeal the old and substitute a new one in its place. This, perhaps, is not the last amendment the Constitution may receive; we ought therefore to be careful how we set a precedent which, in dangerous and turbulent times, may unhinge the whole," and he concluded by saying that by the terms of the Constitution, Congress had a right to propose amendments, which, when duly

ratified, would become a part of the instrument; but it had no power to repeal the whole Constitution.<sup>1</sup>

Gerry, who had a genius for pointing out difficulties to the Federalists, whatever they might propose, was clearly of opinion that Madison's plan of incorporation was the one intended by the Constitution itself; for its words were, that amendments should be valid to all intents and purposes as part of the Constitution. What though the names affixed to the Constitution were lost? They were worthy of high respect; but everybody knew that it was not these names, but the ratification by the States, which gave the act validity. To do as Sherman suggested would give to the first amendment the title of "a supplement to the Constitution of the United States; to the next, a supplement to the supplement, and so on, until we have supplements annexed five times in five years, wrapping up the Constitution in a maze of perplexity."<sup>2</sup> Benson, at this point, explained, that the matter had been agitated in the Select Committee and decided in favor of the form reported, because it conformed to the recommendations of the State conventions.<sup>3</sup> If the amendments were ratified, Congress could order a new edition of the Constitution printed, with the alterations inserted, and the work would stand perfect and entire. No one had hinted at changing the original in the archives of the government. "That will remain there with the names of those who formed it, while the Government has a being." But he thought it convenient and proper to complete the work in the way provided by the instrument itself. The records of Congress, and of the States, would show the progress

<sup>1</sup> *Annals*, 738.

<sup>2</sup> *Id.*, 739.

<sup>3</sup> *Annals*, 740.

of the business, and nothing would appear done, that had not been actually performed.

Hartley, of Pennsylvania, could not agree with Benson, Madison or the majority of the committee. Incorporation of the amendments, he said, would perplex the business. If left simple and entire, they would go to the legislatures on their merits and every man would know on what ground he rested his political welfare. It was finally decided to sustain the report of the committee and to incorporate the amendments in their places. To a later generation, accustomed to look upon the Constitution with veneration, it is somewhat startling to discover that so many of its contemporaries considered it of little more importance than an act of Congress.

Jackson compared the Constitution, as the committee now proposed to amend it, to Joseph's coat of many colors. Why prefix political dogmas to the Preamble? The words, "We the People" spoke as much as it is possible to speak, and were a practical recognition far more expressive than any other mere paper declaration of the right of the people to ordain and establish governments. Sherman, following the same thought, remarked that the words "We the People" could not be used, if Congress amended the Constitution.<sup>1</sup>

The Constitution replied Gerry, was proposed by a Convention at Philadelphia, but with all its importance, it did not possess as high authority as the President, Senate and House of Representatives of the Union. For that Convention was not called in consequence of any express will of the people, but of an implied one, through their representatives in the State legislatures. The Constitution derived no authority from the first Convention;

<sup>1</sup> Annals, 742.

it was concurred in by conventions of the people, and that concurrence armed it with power and invested it with dignity. Congress was expressly authorized by the sovereign and uncontrollable voice of the people, to propose amendments whenever two-thirds of both Houses might think fit. If this was the fact, the preparing of amendments would be found to originate with a higher authority than the original system. The conventions of the several States had agreed, for the people, that the legislatures should be authorized to decide upon amendments in the manner of a convention. If these acts of the legislatures were not good, because the assemblies were not specifically instructed by their constituents, neither were the acts calling the first or subsequent conventions. Evidently, the House thought, with Gerry, that ratification of the amendments, in any form, made them of equal authority with other parts of the Constitution, and, that being equal, they ought to be incorporated with the instrument in their proper places.<sup>1</sup> Sherman's motion, to add the amendments as a body, at the close of the Constitution, having been defeated, the way was clear for considering the propositions in their order.

It was now the fourteenth of August. Gerry objected to the committee's first amendment because it held up the idea that all governments are intended for the benefit of the people. "Now, I am so far from being of this opinion," said he, "I do not believe that one out of fifty is intended for any such purpose. I believe that the establishment of most governments is to gratify the ambition of an individual, who, by fraud, force or accident, has made himself master of the people." He would make the amendment true by inserting that government, "of right" was intended for the benefit of the people, but the change

<sup>1</sup> *Annals*, 744. 1789.

was rejected.<sup>1</sup> Tucker, of South Carolina, thought that the first proposition could not be considered an amendment because the Preamble was no part of the Constitution and therefore the amendment was useless. "For my part, I should as soon think of amending the concluding part, consisting of General Washington's letter to the President of Congress, as the Preamble; but if the principle is of importance, it may be introduced into a Bill of Rights."

Smith replied, that New York, Virginia and North Carolina had expressed a desire for an amendment of this kind. The words, "We the People do ordain and establish this Constitution for the United States of America" were a declaration of their action, was Tucker's answer;<sup>2</sup> this having been performed, Congress, said he, had nothing to do with the matter. Sumpter agreed with him, that the amendment, if thought necessary, should be inserted elsewhere. Page held that the Preamble was no part of the Constitution. Madison, citing the State constitutions, thought that the occasion was strong for the change, especially as it would promote harmony; those who would place it elsewhere would "be puzzled to find a better place." "The words 'we the People,' in the original Constitution," said Sherman, "are as copious and expressive as possible; any addition will only drag out the sentence without illuminating it," but the House again disagreed with him and the amendment was carried.<sup>3</sup>

Vining, who came from the smallest State in the Union, wished the second proposition changed, so that any State, which had a population of forty-five thousand, should be entitled to two representatives; but his motion was lost

<sup>1</sup> Annals, 745.

<sup>2</sup> Annals, 745.

<sup>3</sup> Annals, 747.

without a division. The second amendment had been proposed by Massachusetts,<sup>1</sup> for the reason, as Ames explained, that it would secure the States from any attempt of Congress to reduce representation below a safe point. He wished the basis forty thousand instead of thirty, both on the ground of expense and the probability of securing abler representatives.<sup>2</sup> Madison, who was thinking of the action of the ratifying conventions, and the amendments they had sent up, replied that New Hampshire, Massachusetts, New York, Virginia and North Carolina, had asked for an amendment of this kind; several of these States even desiring an increase of the membership of the House to at least two hundred. "This does not look," said he, "as if certainty was their sole object. Numerous bodies are undoubtedly liable to some objections, but they have their advantages also; if they are more exposed to passion and fermentation, they are less subject to venality and corruption; and in a government like this, where the House of Representatives is connected with a smaller body, it might be good policy to guard them in a particular manner against such abuse." Madison declared that the change proposed by Ames would lose its efficiency after the second census. Thirty thousand was the most proper number, because it was the one agreed on in the original Constitution, and was required by several States. Sedgwick reminded Madison that "large bodies in this country are likely to be composed, in a great measure, of gentlemen who represent the landed interest,<sup>3</sup> generally more temperate in debate than others." "The object of the people was rather to procure certainty

<sup>1</sup> See p. 50, ante.

<sup>2</sup> *Ib.*

<sup>3</sup> Compare *The Federalist*, No. XXXV (by Hamilton).

than increase," answered Ames; "the House of Representatives will furnish a better check upon the Senate, if filled with men of independent principles, integrity and eminent abilities, than if consisting of a numerous body of inferior characters."

If the United States contained three millions of people, Stone reminded Ames, one representative for every thirty thousand would give a hundred members, of whom fifty-one would be a quorum to do business; twenty-six would be a majority—and give law to the United States, together with seven in the Senate.<sup>1</sup> This was certainly a sufficiently small number to administer the government. Would any one, upon mature reflection, think it expedient to reduce it by one-fourth? Ames' amendment was rejected by a large majority. Sedgwick then moved to fix the number at two hundred, instead of one hundred and seventy-five, because, otherwise, the body would be "rather too small to represent such extensive concerns." "In the Convention that framed the Constitution," said Sherman, perhaps forgetting for the moment the oath of secrecy he had taken, respecting its proceedings, "there was a majority in favor of forty thousand; and though there were some in favor of thirty thousand, yet that proposition did not obtain until after the Constitution was agreed to, when the President had expressed a wish that thirty thousand should be inserted as more favorable to the public interest,<sup>2</sup> during the contest between thirty and forty thousand, there were not more than nine States, as he remembered, who voted in favor of the former. The objects of the federal government were fewer than those of the State governments; they did not require an equal degree of local knowledge. The only case, perhaps,

<sup>1</sup> *Annals*, 752.

<sup>2</sup> *Elliot*, V, 555; *Documentary History III*, 764.



where local knowledge would be advantageous was in laying direct taxes, but here they were freed from embarrassment, because the arrangements of the several States might serve as a pretty good rule on which to found their measures."<sup>1</sup> Madison quickly expressed the hope that the House "would not be influenced by what had been related to have passed in the Convention;" the matter must be decided on its merits, not on its history. He was not in favor of the number two hundred, in which he differed from Livermore, Tucker and Gerry, and Lawrence, of New York, who believed that the Senators from the small States, New Hampshire, Rhode Island, Connecticut, New Jersey and Delaware, would never consent to an increase in the membership of the House; for which reason he favored increasing the House gradually till it arrived at two hundred. Ames remarked that "there is a constant tendency in a republican Government to multiply what it thinks to be the popular branch." On the vote, the House sustained Sedgwick's motion, and the amendment was changed so as to fix the maximum membership at two hundred.

This brought the business to the third amendment, on regulating the manner of increasing the compensation of Senators and Representatives. There was little discussion, though Sedgwick remarked that it would afford designing men an opportunity to reduce the compensation so low as to exclude capable, but indigent, men from Congress. Vining interpreted the proposition as highly beneficial, because it would relieve each legislature of performing the disagreeable task of setting a value on its own work; a reason which had moved the committee to retain it in the list. But Sedgwick was not convinced.

<sup>1</sup> *Annals*, 753.

The amendment had two disagreeable aspects, to him: "the one, to render a man popular with his constituents; the other, to render the place ineligible to his competitor." But the amendment passed.<sup>1</sup>

The language of the first part of the proposed fourth amendment was not satisfactory to many. Vining wished its two statements transposed. "It would read better," said Gerry,<sup>2</sup> "if it stated that no religious doctrine shall be established by law." Inasmuch as Congress had no authority whatever delegated to it by the Constitution to make religious establishments, Sherman thought the amendment unnecessary, and wished it struck out. Daniel Carroll, a kinsman of a distinguished Roman Catholic family, of Maryland, and a member of the late Federal Convention, was highly in favor of adopting the words, believing that the amendment would tend more towards conciliating the minds of the people to the government than almost any other he had heard proposed.<sup>3</sup> "I apprehend the meaning of the words to be," said Madison, "that Congress shall not establish a religion and enforce the legal observance of it by law, or compel men to worship God in any manner contrary to their conscience." Whether the words were necessary or not, several of the late conventions had urged the adoption of some such provision, for they feared that the power given by the Constitution to make all laws necessary and proper to carry it into execution, enabled Congress to make laws that might infringe the rights of conscience. Huntington, of Connecticut, feared that the words might be so literally construed as to be "extremely hurtful to the cause of religion." All might not understand the amendment as

<sup>1</sup> Annals, 756.

<sup>2</sup> August 15, 1789.

<sup>3</sup> Annals, 758.

Madison had expounded it. It might be convenient to put upon it an entirely different construction. In New England, the ministers of the congregations<sup>1</sup> were sustained by the contributions of the members of their society, and the expense of building meeting-houses was met in the same way. These matters were regulated by by-laws. If an action were to be brought in a Federal Court, on any of these cases, the person who had neglected to pay his subscription might appeal to this amendment, on the ground that he was not compelled to support a religious establishment. Rhode Island had always enjoyed freedom in religious matters. The rights of conscience ought to be secured, but the amendment should be worded so as "not to patronize those who professed no religion at all."

Madison at once suggested that if the word, national, was inserted before religion, "it would point the amendment directly to the object it was intended to prevent," but his suggestion stirred old memories and revived old antagonisms. Gerry promptly declared his aversion to the word, which reminded him of some observations that had taken place in the ratifying conventions. "It had been insisted, by those who were called Anti-Federalists, that this form of government consolidated the Union." "Those who were called Anti-Federalists at that time complained that they had injustice done them by the title, because they were in favor of a federal government, and the others were in favor of a national one; the Federalists were for ratifying the Constitution as it stood, and the others, not until amendments were made. Their names ought not to have been Federalists and Anti-Federalists, but Rats and Anti-Rats." Gerry then fired a shot at Madison, saying that the latter's motion about the word,

<sup>1</sup> i. e., the Congregational Church.

national, showed that he considered the word implied a consolidated government.<sup>1</sup>

Madison quickly withdrew his motion, observing that the words "no national religion shall be established by law" did not imply that the government was a national one. At this Livermore's amendment of the phraseology was adopted, that "Congress shall make no laws touching religion, or infringing the rights of conscience."<sup>2</sup> And thus the perils of a prolonged discussion,—whether the government was national or federal,—were avoided.

The provisions, common to the State constitutions, securing freedom of the press, the right of petition, and, in a few States, freedom of speech, had schooled most of the members into familiarity with the next clause, embodying the provisions and now proposed as part of the third amendment.<sup>3</sup> Sedgwick promptly criticised it as descending too much into minutia and thus making the House appear trifling to its constituents. Tucker fell back on the request of Virginia and North Carolina that the amendment be made. Gerry cited the State constitutions, though the abuse of rights in Massachusetts persuaded some against the clause. Sedgwick thought the word "consult" superfluous and moved that it be struck out. Tucker wished to insert the words, "to instruct their Representatives." A long debate followed on the question of instruction,<sup>4</sup> Page asserting that instruction and representation went together in a republic. But Clymer declared the idea dangerous and utterly destructive of all thought of an independent and deliberative body, and Sherman agreed with him. "When the people

<sup>1</sup> *Annals*, 759.

<sup>2</sup> *Annals*, 759.

<sup>3</sup> For the clause see p. 204.

<sup>4</sup> *Annals*, 761-766.

have chosen a representative," said Sherman, "it is his duty to meet others from the different parts of the Union and consult and agree with them to such acts as are for the general benefit of the whole community. If they were to be guided by instructions, there would be no use in deliberation; all that a man would have to do would be to produce his instructions, lay them on the table and let them speak for him. From hence I think it may be fairly inferred that the right of the people to consult for the common good can go no further than to petition the legislature, or apply for a redress of grievances. It is the duty of a good representative to inquire what measures are most likely to promote the general welfare, and after he has discovered them, to give them his support. Should his instructions therefore coincide with his ideas on any measure, they would be unnecessary; if they were contrary to the conviction of his own mind, he must be bound by every principle of justice to disregard them."

Jackson, pursuing the argument further, affirmed that, if the doctrine of instruction was established, it would necessarily drive the House into a number of factions, as there might be different instructions from every State. "To say that sovereignty vests in the people, and that they have not a right to instruct and control their representatives," said Gerry, "is absurd to the last degree." But he understood the amendment only as recognizing the right of instruction, not as compelling the representative to be bound by his instructions. With this last opinion, Madison agreed, for the people might instruct their representative to violate the Constitution, in which case he could not be expected to obey. Smith, of South Carolina, opposed the provision because it put the more distant States to a disadvantage,—as the nearer ones could more easily communicate their instructions to their members.

The southern States would thus be seriously injured. Stone remarked that the only precedent was that of the Swiss cantons, where the people instructed their representatives, and also voted directly on the laws; but no such form of government had been advocated for America. Vining touched the great issue of the times by asking, what the members would do were their constituents to instruct them to make paper money; surely, such directions, contrary to the Constitutions, would be disobeyed. Livermore thought that instructions voted by State Legislature would have much force, though he did not believe them binding. Sedgwick wishing to set Livermore right, replied, that members of the House stood, not as representatives of the State Legislatures, as under the old Congress, but as representatives of the great body of the people. "The sovereignty, the independence and the rights of the States are intended to be guarded by the Senate." If the House was to be viewed in any other light, "the greatest security the people have for their rights and privileges is destroyed."

Page feared that unless the amendment was adopted, many constituencies would be alarmed, as they had asked for it. Lawrence, with a comprehension rare even among the Fathers, remarked that he objected to the amendment, "because every member ought to consider himself the representative of the whole Union, and not of the particular district which had chosen him," but lest the prevalence of this national spirit be over-estimated, by the readers of to-day, it is well to consider the concluding words of Lawrence: "The decisions of Congress," said he, "were to bind every individual of the confederated States, and it was wrong to be guided by the voice of a single district whose interests might happen to clash with those of the general good." The phrase "confederated States" was the usual

description of the Union during the first eighty-five years of its existence. Not until after the inauguration of Lincoln and the battle of Gettysburg did it become usual for men, even in public life, to speak of the United States as a Nation, and to drop the words confederate and confederacy, as descriptive of the Union. This use of Confederacy, instead of Nation, is repeatedly illustrated during the debates on the proposed amendment of 1861, and the use of Nation, instead of Confederacy, first became common in the debates in Congress on the enactment of the thirteenth, fourteenth and fifteenth amendments, in 1865-1868.

Burke at this point read from the amendments recommended by New York, Virginia, New Hampshire and North Carolina and complained that the committee had omitted the essential requests of these States. North Carolina, it was true, had made express mention of its wish for the guarantee now under discussion, but this general attack on the report provoked a general call for the question and the amendment as reported by the committee was adopted. On the seventeenth, the next clause, on the militia, was taken up. Gerry objected to its phraseology and wished the latter part of it changed so that the exemption from military service would be limited to persons belonging to religious sects, scrupulous of bearing arms. All the people of the United States would not turn Quakers or Moravians, was Jackson's comment; "one part would have to defend the other in case of invasion; therefore those scrupulous about fighting should in some way contribute to the common defense," and he moved, as a further change in the clause, that exemption be allowed "upon paying an equivalent, to be established by law," thus bringing the amendment into line with some of the State constitutions. Smith, of South Carolina, thought

the language of the Virginia and North Carolina amendments best,—that those excused must find a substitute, and Jackson changed the wording of his amendment, that “no one religiously scrupulous of bearing arms, shall be compelled to render military service, in person, upon paying an equivalent.” Sherman, who found little he liked in the amendments, preferred the original language of this one. “It is well known,” said he, “that those who are religiously scrupulous of bearing arms are equally scrupulous of getting substitutes or paying an equivalent. Many of them would rather die than do either one or the other. We do not live under an arbitrary Government; the States, respectively, will have the government of the militia, unless when called into actual service; besides it will not do to alter it so as to exclude the whole of any sect, because there are men amongst the Quakers who will turn out, notwithstanding the religious principles of the society, and defend the cause of their country.”<sup>1</sup> Benson wished the words, “but no person religiously scrupulous shall be compelled to bear arms,” struck out,—leaving this matter to the benevolence of the legislature, but a motion to strike out the whole clause was lost by two votes.

Gerry made one more effort to modify the phraseology, so as to make the clause read, “a well regulated militia trained to arms,” but he was not supported, and the clause was adopted as reported. Edanus Burke, seemingly mindful of the provision common to the State constitutions, that the military be subordinate to the civil authority, now moved to amend the clause by adding such a provision, making it also unconstitutional to raise or keep up a standing army in time of peace without the consent of two-thirds of the members present in both Houses; but

<sup>1</sup> Annals, 779.



being new matter, and awakening little interest, his motion was lost by a majority of thirteen.

Perhaps the old complaint, made by Jefferson, in the Declaration of Independence, that the King had quartered troops upon the people of America without their consent, was in the mind of Madison when he wrote the next amendment. Sumpter wished the clause abbreviated so as to read, "No soldier shall be quartered in any house without the consent of the owner," which materially changed the amendment.<sup>1</sup> Sherman at once observed, that the quartering of troops, while marching, whether in peace or war, was necessary, and that it ought not to be put in the power of an individual to obstruct the public service. A majority of sixteen rejected Sumpter's amendment. Gerry proposed to change the clause so as to read at the close, that the quartering of troops should not be permitted, "but by a civil magistrate, in a manner to be prescribed by law;" remarking that either his amendment was essential, or the whole clause was unnecessary. But his ideas found little support and the original clause was adopted.

This brought the matter to the sixth clause of the fourth amendment.<sup>2</sup> It provided that no person should be tried more than once for the same offense, but this was contrary to the right already established. Benson thought the language obscure. Probably the clause was intended to express what was secured by the former law of America,—the British constitution,—that no man's life should be more than once put in jeopardy for the same offense, yet it was well known that a man was entitled to more than one trial. The humane intention of the clause was to prevent more than one punishment, and it should be

<sup>1</sup> Annals, 781.

<sup>2</sup> For the text of it, see p. 206.

amended by striking out the words "one trial or," with which idea Sherman agreed; but the House voted it down. Lawrence pointed out that the clause conflicted with laws already passed, in that the exemption of being compelled to give evidence against one's self should be confined to criminal cases; an amendment which was at once unanimously agreed to, and the amended clause was then adopted.<sup>1</sup>

The English Bill of Rights of 1689 was the ancient precedent for the next clause, respecting excessive bail, and fines and cruel and unusual punishments. It was found in most of the State constitutions. Smith, of South Carolina, thought the language too indefinite, and Livermore wished it struck out, as having no meaning, but it was agreed to, in its ancient form. Gerry detected a fault in the phraseology of the next, the seventh clause, and suggested that it read: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches,"—which was adopted. Benson objected to the words "by warrants issuing" and wished them changed to the simpler form, "no warrant shall issue," but was not successful; the committee of the whole finally adopting the clause with Gerry's amendment of its language.<sup>2</sup> The last clause of the fourth amendment was also adopted, and without change, though Gerry proposed a substitute for the word "disparage."

The amendments, down to this point, had been directed to the operations of the national government; the next one, the fifth,<sup>3</sup> was a limitation of the power of the States. Tucker at once remarked that as it went to the alteration of the State constitutions, it better be left to the State

<sup>1</sup> Annals, 782.

<sup>2</sup> Annals, 783.

<sup>3</sup> For the text see p. 208.

governments. His idea was not to interfere with them more than had already been done, and that was thought by many "to be rather too much;" and he moved to strike out the amendment. But Madison, who also had respect for the rights of the States, immediately replied that he considered this the most important amendment in the whole list.<sup>1</sup> If there was any reason for restraining the government of the United States from infringing upon these essential rights, it was equally necessary that these should be secured against the State governments. Livermore then moved that the proposition be re-arranged and made affirmative,—that "The equal rights of conscience, the freedom of speech or of the press and the right of trial by jury in criminal cases shall not be infringed by any State," and Tucker's motion being rejected, the amendment was adopted in the form Livermore had proposed.

The next amendment<sup>2</sup> in limiting the value, in cases of appeal, to one thousand dollars, seemed faulty to Benson, because an important question, involving less than that amount, might arise. Madison quickly explained that any restriction which would answer the purpose might be substituted. "There is little danger," said he, "that any court in the United States will admit an appeal, where the matter in dispute does not amount to a thousand dollars; but as the possibility of such an event has excited in the minds of many citizens the greatest apprehension, that persons of opulence would carry a cause from the extremities of the Union to the Supreme Court, and thereby prevent the due administration of justice, it ought to be guarded against." At this, Sedgwick suggested three thousand dollars instead of one; but the

<sup>1</sup> Annals, 784.

<sup>2</sup> The sixth; see p. 209.

amendment was carried in its original form. Madison's fears suggest how intimately the affairs of government are affected by the economic conditions of a country. Had good roads, connecting all parts of the Union, existed at this time, Madison would not have feared that the rich would have undue advantages over the poor, in cases of appeal to the Supreme Court.

The seventh amendment consisted of three clauses. The first, on the right of the accused in criminal prosecutions, was slightly changed, on motion of Livermore, so as to secure to the criminal the right of being tried in the State where the offense was committed.<sup>1</sup> Though Stone pointed out that full provision was made on the subject in the next clause, Livermore's motion was adopted. On the eighteenth, the business was resumed and Gerry moved that such amendments to the Constitution proposed by the States as were not in substance included in those already reported by the Committee of Eleven, be referred to a Committee of the whole House. Tucker, in supporting the motion, reminded the House, that the States, which had proposed amendments, would feel chagrin at having misplaced their confidence in the government. Five important commonwealths had plainly expressed their apprehensions, and, if these were not allayed, they would naturally recur to the alternative of calling another Federal Convention; and States that were exerting themselves to obtain a second Federal Convention and those that opposed the measure might feel so strongly the spirit of discord as to sever the Union asunder. If, on the other hand, a convention could not be obtained, the consequence resulting was equally to be dreaded; it would render the administration of the system of government weak, if not impracticable; for no gov-

<sup>1</sup> *Annals*, 785.

ernment can be administered with energy, however energetic its system, unless it obtains the confidence and support of the people. He considered it difficult, if not impossible, to obtain essential amendments by the way pointed out in the Constitution. It would be found, he feared, the more difficult because these amendments, should they be agreed to by two-thirds of both Houses of Congress, might be submitted for ratification to the legislatures of the several States, instead of State conventions, in which case the chance was still worse. The legislatures of almost all the States consisted of two independent distinct bodies; the amendments must be adopted by three-fourths of such legislatures; that is to say, they must meet the approbation of the majority of each of eighteen deliberative assemblies. But even in the face of such difficulties, the House could diminish them by taking up with candor and attention all the amendments proposed by the States, and thus meet the expectations of the people.<sup>1</sup> Madison remarked that he was just about to refer these amendments, but they could not be conveniently taken up with the report of the Committee of Eleven. However, as a matter of parliamentary procedure, quite as much as one of expediency, the House rejected Gerry's motion, and then resumed its discussion of the remaining amendments, in Committee of the Whole.

The second and third clauses of the seventh amendment on criminal prosecutions and the trial of crimes, were adopted without change.<sup>2</sup> The eighth, on the separation of the powers of government, almost a transcript of the provision in the constitution of Massachusetts,<sup>3</sup> was pro-

<sup>1</sup> *Annals*, 787.

<sup>2</sup> See text on p. 209.

<sup>3</sup> See p. 50. It was taken from Constitution of Massachusetts, 1780, Bill of Rights, XXX.

nounced by Sherman "altogether unnecessary," as "the Constitution assigned the business of each branch of the government to a separate department. Madison thought it would gratify the people and perhaps explain some doubts that might arise over the construction of the Constitution. Livermore agreed with Sherman, but the proposition was carried.

The ninth amendment, Tucker proposed, should be modified by prefixing the statement, that "All powers being derived from the people, the powers not 'expressly' delegated by the Constitution, nor prohibited by it to the States are reserved to the States respectively." Madison objected to Tucker's amendment "because it is impossible to confine a government to the exercise of express powers; powers must necessarily be admitted by implication, unless the constitution descends to recount every minutia." He remembered the word "expressly" had been moved in the Virginia convention by the opponents to ratification, and, after full and fair discussion, given up by them, and the system allowed to retain its present form." With these ideas of Madison Sherman agreed, observing that "Corporate bodies are supposed to possess all powers incident to a corporate capacity, without being absolutely expressed." Tucker understood the word "expressly" in a different light. Every power that could be clearly comprehended within any accurate definition of the general power, he thought to be expressly given.<sup>1</sup> But the Committee rejected his motion. Carroll then proposed that, at the end of the proposition there should be added, that these powers were reserved "to the States respectively, or to the people," which was agreed to. That the seventh article of the original Constitution be numbered eight, was the tenth amendment proposed and was agreed to

<sup>1</sup> *Annals*, 790.

without debate, and the entire list was now gone through with.

On the nineteenth, the House took up the report of the Committee of the Whole, which was the amendments as they had passed. Sherman again moved to add them by way of supplement to the Constitution, instead of incorporating them into the instrument, as had been agreed on. After a debate, like that already heard on the subject, Sherman's motion was now carried by a two-thirds vote.<sup>1</sup> Nor did the reversal of former proceedings stop here. The first amendment was thrown out, and Ames attempted to carry through his motion, for one representative to every thirty thousand inhabitants, at the first census, and one for every forty at the second; but the House broke up without reaching any decision. Next morning the matter was resumed; several other propositions on the same point were introduced, all of which were laid on the table; the House then took up the third amendment and passed it.

On motion of Ames, the phraseology of part of the fourth amendment was changed so as to read, "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." Scott, of Pennsylvania, objected to the clause of the fourth amendment agreed on, that "No person, religiously scrupulous, shall be compelled to bear arms." If this became part of the Constitution, such persons could neither be called upon for their services, nor could an equivalent be demanded. Moreover, a militia could never be depended upon. The objectionable clause, was, moreover, likely to lead to a conflict with another part of the instrument, which secured to the people the right of

<sup>1</sup> Id., 795.

keeping arms, and in this case, recourse must be had to a standing army. The whole matter was one of legislative right. There were many sects religiously scrupulous about bearing arms, and they should not be deprived of any indulgence the law allowed; but the State must be guarded against those who had no religion. If the time ever came when religion should be discarded, the generality of persons would have pretexts to get excused from bearing arms. Finally it was agreed to change it so as to read, "no person, religiously scrupulous, should be compelled to bear arms 'in person,' " at the end of the clause, after which it was adopted; as were the remaining amendments down to the eighth.<sup>1</sup>

On the twentieth, discussion of the report of the Committee of the Whole was resumed at the clause of the seventh amendment, regulating the trial of crimes. The last part beginning with the words, "but if a crime be committed in a place in the possession of an enemy," and so on to the end, was struck out, and the preceding part adopted. The next clause, securing trial by jury, and the eighth amendment, on the separation of powers, were agreed to without debate. Gerry revived Tucker's motion, respecting the ninth amendment, that the word, "expressly" be inserted, so that it read that, "The powers not expressly delegated by the Constitution, nor prohibited to the States, are reserved to the States respectively, or to the people." The yeas and nays were called for, and the test was made; but Gerry's change was rejected by a vote of nearly two to one. Sherman then moved to alter the clause, making it read, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States,

<sup>1</sup> *Annals*, 796.



respectively, or to the people," which was adopted without debate.<sup>1</sup>

Burke now moved another amendment that, "Congress shall not alter, modify, or interfere in the times, places, or manner of holding elections of Senators, or Representatives, except when any State shall refuse, or neglect, or be unable, by invasion or rebellion, to make such election." This great question, destined to remain unsettled, provoked a lively discussion.<sup>2</sup> Ames, with characteristic, comprehensive view of matters, declared that this was one of the most justifiable of all the powers of Congress. It was essential to a body, representing the whole community, that it should have power to regulate its own elections, in order to secure a representation from every part, and to prevent any improper regulations calculated to answer party purposes only. "It is a solecism in politics to let others judge for them, and is a departure from the principles upon which the Constitution was founded." Livermore agreed with Ames as to the importance of the amendment. It had caused more debate in the Convention of New Hampshire than any other whatever. Ames had said it was a solecism in politics, but Livermore promptly cited the case of the election of Smith, of South Carolina, and asked whether State laws had not decided his qualification as a member of the Federal Legislature.<sup>3</sup> "It was not supposed by the people of South Carolina that the House would question a right derived by their representative from their authority."

Madison, as the leader of the House, in charge of the amendments, objected to including with them this now submitted by Burke, principally on the ground that the

<sup>1</sup> Id., 797.

<sup>2</sup> Annals, 797-802.

<sup>3</sup> For an account of this disputed election, see Annals, 1789, Vol. I, 413.

## REGULATION OF ELECTIONS.

Constitution, on the point in question, stood very well as it was. Gerry, Stone and Smith, of South Carolina, favored the amendment, Smith asserting that eight States had expressed a wish that the general government relinquish its control over elections. He cited New Hampshire, Massachusetts, New York, Pennsylvania, Maryland, Virginia and the Carolinas, but Carroll denied that Maryland was among the number, and he was supported by Stone who said that nothing of the kind was on the journals of the Maryland convention. Fitzsimons corrected him as to Pennsylvania, but Smith cited the amendment proposed on the subject by the Harrisburg minority. Sedgwick thought that Congress should be given power to alter the times, manner and places of holding elections, provided the States made improper ones. Sherman reminded the House that the Federal Convention was very unanimous in passing the provision in the Constitution on the subject, as it was of great importance. "If it was resigned, it would tend to subvert the government." Madison was convinced that Burke's amendment would tend to destroy the principles and the efficacy of the Constitution; therefore he was opposed to it. Smith, of South Carolina, here observed that the States had the sole regulation of the election of the President. Why were they indulged in this and prohibited to regulate the election of Senators and Representatives? Burke's amendment admitted the right of the general Government to interfere, whenever the State Legislature refused, or neglected to secure elections. It might be that the matter would be neglected by a State with no design to injure the general government. The two branches of the State legislature might not agree, as had happened in New York, when that State failed, recently, to choose Senators.<sup>1</sup>

<sup>1</sup> New York was not represented in the Senate at this time.

Tucker objected to Sedgwick's amendment, because it would defeat the one offered by Burke. The general government would be the judge of inadequate, or improper regulations. Consequently it might interfere in any, or every election law which the State might pass. The State legislatures should be left to themselves to perform everything they were competent to, without the guidance of Congress. They knew best how to pursue their own good. It seemed to Tucker that there was a strong tendency in the general government to take upon itself the guidance of the State governments, which fact implied a doubt of their capacity to govern themselves. On the contrary, these could take care of themselves and deserved the more to be trusted because the rights of the citizens were more secure under them. Some States thought that election by districts was the best mode of choosing members of Congress; others preferred a general ticket. Might not Congress set aside their regulations? Virginia was divided into eleven districts and many of its citizens thought themselves abridged of nine-tenths of their privilege by being restrained to the choice of one man instead of ten, the number of representatives of the State in Congress. The mode of electing Senators was fixed. Every State, save New York, had established a precedent and New York suffered from her own act.

Goodhue, alarmed at the havoc that Burke's amendment would make, now declared that rather than it should take effect, he would vote against all that had been agreed to. His gravest apprehension was that, "the State governments would oppose and thwart the general one to such a degree as finally to overturn it." To guard against this evil, the federal government should possess every power necessary to its existence. But both amendments were lost; Burke's, however, only by a majority of five. The

House then resumed Ames's proposition about the apportionment and the basis of representation and the amendment on the subject was changed to read: "After the first enumeration, required by the first article of the Constitution, there shall be one representative for every thirty thousand, until the number shall amount to one hundred. After which, the proportion shall be so regulated by Congress, that there shall be not less than one hundred representatives, nor less than one representative for every forty thousand persons, until the number of representatives shall amount to two hundred, after which the proportion shall be so regulated by Congress, that there shall not be less than one representative for fifty thousand persons."

On the twenty-second, Tucker offered a new amendment, forbidding Congress to lay direct taxes, except when the income from the indirect was insufficient, and not then, till a requisition had been made on the States.<sup>1</sup> In case a State failed to respond, Congress should levy the tax, with six per cent additional from the time of payment. Livermore pronounced this the most important amendment yet proposed. He and most of his colleagues had vague notions of the taxing powers of the government. The Confederation had collapsed for lack of these powers. State quotas had failed, yet many still had confidence that the quota system was the best for the country and had failed only because it had been mismanaged. Of that vast and complicated system of taxation which now goes under the name of a tariff act, Livermore and the supporters of Tucker's motions had no conception. The six per cent penalty was, they thought, a shrewd device likely to keep delinquent States in order.

<sup>1</sup> *Annals*, 803.

But Livermore and his friends in Congress partook of a fear common at the time, that direct taxation by both the States and the United States would cripple the country. He cited several State amendments on this point. The only thing that would deter the general government from laying direct taxes would be the difficulty of managing the matter. "The modes of levying and collecting taxes pursued by the several States are so various, that it is an insuperable obstacle to an attempt by the general government." Sumpter, of North Carolina, went further: "If the power was not relinquished by the general government, the State governments would be annihilated." Gerry continued in the same strain. The fault with the Constitution was that every power of taxation was relinquished to the general government. The States should be left capable of supporting themselves. Now they were divested of every power. If they discovered a new source of revenue, the rapacity of the general government could take it from them. Sedgwick pointed out that a government entrusted with the very existence of a people ought surely to possess, in a most ample degree, the means of support, and therefore he opposed Tucker's amendment.<sup>1</sup> His relief and that of the Federalists was speedy, for the proposed amendment was rejected by a majority of thirty. Gerry, doubtless thinking of one of Jefferson's suggestions about amendments, now offered one forbidding monopolies, and another, forbidding any one in the national service to accept any title of nobility or office from a foreign State, or any King or Prince; but his suggestions were rejected and the amendments lately adopted, together with a form of submission to the States, were

<sup>1</sup> See Washington's letter to Jefferson, on this point, August 31, 1788.

handed over to a special committee, consisting of Benson, Sherman and Sedgwick, with instructions to arrange and report them.<sup>1</sup>

Their report reached the Senate on the twenty-fifth

<sup>1</sup> Annals, 808.

**REPORT OF THE SPECIAL COMMITTEE OF THREE, AUGUST  
24, 1789.**

**Third Draft of the Amendments. Senate Journal for August  
25, 1789.**

**Art. I.** After the first enumeration, required by the first article of the Constitution, there shall be one representative for every thirty thousand, until the number shall amount to one hundred; after which the proportion shall be so regulated by Congress that there shall be not less than one hundred representatives, nor less than one representative for every forty thousand persons, until the number of representatives shall amount to two hundred, after which the proportion shall be so regulated by Congress that there shall not be less than two hundred representatives nor less than one for every fifty thousand persons.

**Art. II.** No law varying the compensation to the members of Congress shall take effect until an election of representatives shall have intervened.

**Art. III.** Congress shall make no law establishing religion, or prohibiting the free exercise thereof; nor shall the rights of conscience be infringed.

**Art. IV.** The freedom of speech and of the press and of the right of the people peaceably to assemble and to apply to the government for redress of grievances, shall not be infringed.

**Art. V.** A well-regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed, but no one religiously scrupulous of bearing arms shall be compelled to render military service in person.

**Art. VI.** No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in a manner to be prescribed by law.

**Art. VII.** The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause supported by oath or affirmation and partic-

ularly describing the place to be searched and the persons or things to be seized.

Art. VIII. No person shall be subject except in case of impeachment to more than one trial, or one punishment for the same offence, nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Art. IX. In all criminal prosecutions the accused shall enjoy the right of a speedy and public trial; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Art. X. The trial of all crimes (except in cases of impeachment, and in all cases arising in the land and naval forces, or in the militia when in actual service, in time of war, or public danger) shall be by an impartial jury of the vicinage, with the requisites of unanimity for conviction, the right of challenge, and other accustomed requisitions; and no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment of indictment by a grand jury; but if a crime be committed in a place in the possession of an enemy, or in which an insurrection may prevail, the indictment and trial may, by law, be authorized in some other place within the same State.

Art. XI. No appeal to the Supreme Court of the United States shall be allowed when the value in controversy shall not amount to one thousand dollars; nor shall any fact, triable by a jury according to the course of the common law, be otherwise re-examinable than according to the rules of common law.

Art. XII. In suits at common law, the right of trial by jury shall be preserved.

Art. XIII. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Art. XIV. No State shall infringe the right of trial by jury in criminal cases, nor the rights of conscience, nor the freedom of speech or of the press.

Art. XV. The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

Art. XVI. The powers delegated by the Constitution to the Government of the United States shall be exercised as therein appropriated, so that the Legislative shall never exercise the

of August, and consisted of seventeen articles.<sup>1</sup> Of their reception and treatment by the Senate we have slight knowledge. Maclay, the republican Senator from Pennsylvania, records that on the day of their arrival, "they were treated contemptuously by Izard, Langdon and Mr. Morris. Izard moved that they should be postponed till next session. Langdon seconded and Mr. Morris got up and spoke angrily, but not well. They, however, lost their motion, and Monday was assigned for taking them up. I could not help observing the six-year class (of Senators) hung together on this business, or the most of them."<sup>2</sup>

That the Senate strongly dissented from many of the articles;<sup>3</sup> that it modified and amended them; that they went back to the House; that the House refused to recede; that the amendments were sent to a Committee of Conference<sup>3</sup> and that, on the twenty-fourth of September, the House receded from its disagreement, provided the Senate would acquiesce in alterations in two articles,<sup>3</sup> and

powers vested in the Executive or Judicial; nor the Executive exercise the powers vested in the Legislative or Judicial; nor the Judicial the powers vested in the Legislative or Executive.

Art. XVII. The powers not delegated by the Constitution prohibited by it to the States are reserved to the States, respectively, or to the people.

<sup>1</sup> Senate Journal, August 25, 1789.

<sup>2</sup> Maclay's Journal, 134.

<sup>3</sup> Annals, 948.

#### THE AMENDMENTS OF 1789 AS THEY PASSED CONGRESS SEPTEMBER 25.

(Fourth Draft). Senate Journal, 1789, Appendix.

Art. I. After the first enumeration required by the first article of the Constitution, there shall be one representative for every thirty thousand, until the number shall amount to one hundred; after which the proportion shall be so regulated by Congress that there shall be not less than one hundred representatives nor less than one representative for every forty thousand persons until the number of representatives shall amount to two hundred, after



that on the following day the Senate concurred and the amendments were adopted,<sup>1</sup> is about all we know of their history from the time the Special Committee of Three was appointed by the House. But meanwhile the amendments had undergone great changes. The seventeen had become twelve and, of these twelve, the last ten were destined to become the first ten of the Constitution.<sup>2</sup>

which the proportion shall be so regulated by Congress that there shall not be less than one representative for every fifty thousand persons.

Art. II. No law, varying the compensation for the services of the Senators and Representatives, shall take effect until an election of Representatives shall have intervened.

Art. III. Same as Constitution, Amendment I.

Art. IV. Same as Constitution, Amendment II.

Art. V. Same as Constitution, Amendment III.

Art. VI. Same as Constitution, Amendment IV.

Art. VII. Same as Constitution, Amendment V.

Art. VIII. Same as Constitution, Amendment VI.

Art. IX. Same as Constitution, Amendment VII.

Art. X. Same as Constitution, Amendment VIII.

Art. XI. Same as Constitution, Amendment IX.

Art. XII. Same as Constitution, Amendment X.

<sup>1</sup> Annals, 90.

<sup>2</sup> Madison, writing of the Senate amendments: "Alterations which strike, in my opinion, at the most salutary articles. In many of the States, juries, even in criminal cases, are taken from the State at large; in others, from districts of considerable extent; in very few, from the county alone. Hence, a dislike to the restraint with respect to vicinage which has produced a negative on that clause. A fear of inconvenience from a constitutional bar to appeals below a certain value, and a confidence that such a limitation is not necessary, have had the same effect on the article."

Letter to Edmund Randolph, September 14, 1789.

Works, I, 491.

They (the amendments) were far short of the wishes of our convention, but as they are returned by the Senate they are certainly much weakened. The most essential danger from the present system arises, in my opinion, from its tendency to a con-

While they were before the States, North Carolina and Rhode Island ratified the Constitution. The first State to ratify the amendments was New Jersey, on the 20th of November, 1789; the last was Virginia,<sup>1</sup> on the 15th of December, two years later. Massachusetts, Connecticut and Georgia are not recorded as giving them their assent. The ratification of the amendments by Rhode Island was announced to Congress by Washington, on the last day of June, 1790.<sup>2</sup> Rhode Island was the ninth State to approve them, and its act made them a part of the Constitution. Fourteen years passed before the Constitution was again amended. During the interim political parties were organized, great constitutional issues arose and the government passed into the control of the party which, in its early history, had opposed the ratification of the Constitution. Many amendments were proposed during these fourteen years. In order to simplify the narrative, I will next consider the causes and the adoption of the eleventh and twelfth amendments, and then return to the order of events and the organization of the federal government.

solidated government instead of a Union of confederated States." Thinks the United States too extensive for a consolidated government; a new convention desirable.

R. H. Lee to Patrick Henry, September 14, 1789.

Lee's Lee, II, 98.

<sup>1</sup> The Virginia Senators, Lee and Grayson, to the Speaker of the Virginia House of Delegates, with copy of the XII Amendments:

"It is impossible for us not to see the necessary tendency to consolidate empire in the natural operation of the Constitution, if no further amended than as we proposed, and it is equally impossible for us to be not apprehensive for civil liberty when we know of no instance in the records of history that shows a people ruled in freedom when subject to one undivided government and inhabiting territory so extensive as that of the United States and when, as it seems to us, the nature of man and of things pre-

vents it." "Such amendments therefore as may secure against the consolidation of the State governments we devoutly wish to see adopted."

September 28, 1789. Lee's Lee, II, 100.

In a letter to Patrick Henry R. H. Lee remarks on no prospect of further amendments this session. Regrets that Virginia rejected those proposed: "They (amendments) inculcate upon the minds of the people just ideas of their rights; it will always be hazardous for rulers, however possessed of means, to undertake a violation of what is generally known to be right and to be encroachments on the rights of the community; besides that by getting as much as we can at different times, we may at last come to obtain the greatest part of our wishes." Advises a campaign in Virginia to elect members of Congress who will "exert themselves to procure such additional amendments as not yet been made."

June 10, 1790. Lee's Lee, II, 102.

The amendments were rejected by Virginia at first. While they were before the Virginia Legislature Madison wrote to Washington: "The fate of the amendments proposed by Congress to the General Government is still in suspense. In a committee of the whole House (of Delegates of Virginia) the first ten were acceded to with little opposition, for on a question taken on each separately there was scarcely a dissenting voice. On the two last, a debate of some length took place, which ended in rejection. Mr. Edmund Randolph, who advocated all the others, stood on the contest in the front of opposition. His principal objection was pointed against the word "retained" in the eleventh proposed amendment, and his argument, as I understood it, was applied in this manner: that as the rights declared in the first ten of the proposed amendments were not all that a free people would require the exercise of, and as there was no criterion by which it could be determined whether any particular right was retained or not, it would be more safe and more consistent with the spirit of the first and seventeenth amendments proposed by Virginia, that this reservation against constructive power should operate rather as a provision against extending the powers of Congress by their own authority than a protection to rights reducible to no definite certainty. But others, among whom I am one, see not the force of this distinction. \* \* \* Whatever may be the fate of the amendments submitted by Congress, it is probable that an application for further amendment will be made by this Assembly; for the opposition to the Federal Constitution is, in my opinion, reduced to a single point,—the power of direct taxation. Those

who wish the change are desirous of repeating the application (i. e., already made in the Virginia amendments proposed by the ratifying convention of 1788), while those who wish it not are indifferent on the subject, supposing that Congress will not propose a change which would take from them a power so necessary for the accomplishment of those objects which are confided to their care.

Letter to Washington, from Orange, Va., December 5, 1789; Works of Madison, I, 497.

Madison on the loss of the amendments in Virginia: "On some accounts, this event is no doubt to be regretted, but it will do no injury to the General Government. On the contrary, it will have the effect with many of turning their distrust towards their own Legislature."

Madison to Washington, Georgetown, January 4, 1790; Works, I, 500. Virginia ratified December 15, 1791.

<sup>2</sup> Messages and Papers of the President's, I, 76.

The twelve amendments submitted to the State Legislatures were ratified, rejected, or not acted upon by them as follows:

New Jersey, November 20, 1789, ratified all except No. 2.

Maryland, December 19, 1789, ratified Nos. 1, 2, 3, 9, 12; rejected Nos. 4, 5, 6, 7, 8, 10, 11.

North Carolina, December 22, 1789, ratified all the amendments.

South Carolina, January 19, 1790, ratified all.

New Hampshire, January 25, 1790, ratified all except No. 2.

Delaware, January 28, 1790, ratified all except No. 1.

Pennsylvania, March 10, 1790, ratified all except No. 1, and ratified No. 1 September 26, 1791.

New York, March 27, 1790, ratified all.

Rhode Island, June 15, 1790, ratified all except No. 11.

Vermont, November 3, 1791, ratified all.

Virginia, from October 25 to December 15, inclusive, 1791, ratified them all.

Massachusetts, Connecticut and Georgia, so far as the record at the Department of State shows, did not act on them.

Thus the first two were rejected by the action of New Jersey, New Hampshire, Delaware, and by the non-action of Massachusetts, Connecticut and Georgia.

For the official notices of the action by the State Legislatures, see Documentary History, II, Washington, Department of State: 1895, pp. 325-390.

The ratifications are given in the Journals of the House (1st Cong., 2nd Sess.), and of the Senate.

## CHAPTER VII.

### THE ELEVENTH AND TWELFTH AMENDMENTS.

When the Constitution was completed and published for the consideration of the country, a lawyer, familiar with American history and critically analyzing the new plan, would undoubtedly have pronounced the judiciary its most novel feature. The cumbersome device attempted by the Articles of Confederation as a substitute for a judiciary had failed. On no subject were the framers of the Constitution more at harmony than the necessity of providing a national court of last resort. In forming it, they had to proceed without experience and almost without precedent. Their own interpretation of the necessities of the situation was their chief guide. They did not organize a judicial department expressly for the purpose of interpreting the Constitution. It was to be a court of last resort in law and equity. In settling whatever business might come before it, the court would determine the meaning of laws and thus, of course, interpret the Constitution. Its primary function would be to hear and determine suits between parties, whether individuals, or corporations, private or public,—and its jurisdiction was made comprehensive. The Convention, at best, could only vest the judicial power; outline its jurisdiction; assure its organization and independence, and leave the details of whatever judicial system might be thought best to be worked out by the wisdom of Congress. Thus it followed that our national judiciary was organized by that great law of 1789, known as the Judiciary Act, of which Ellsworth was the chief author, and with which

the name of William Samuel Johnson, also a member of the Federal Convention, is forever associated.

As most of the framers of the Constitution were lawyers, and several of them possessed legal minds of the highest order, it was to be expected that the article on the judiciary would receive most critical attention and that, at last, it would leave their hands in as perfect form as men, familiar with political theories and grounded in legal practice, could suggest. A constitution of government is a practical device for carrying on public business. A person reading the Constitution of the United States and depending for his knowledge of our institutions upon its apportionment of political powers would be unable to discover, in the four brief paragraphs on the judiciary, more than a hint of the meaning of the plain language which vests "the judicial power of the United States." Gouverneur Morris, who wrote the Constitution in the form in which it was signed, has left us an interesting letter in which he refers to the language of the article on the judiciary. "That instrument," says he, speaking of the Constitution as a whole, "was written by the fingers which write this letter. Having rejected redundant and equivocal terms, I believed it to be as clear as our language would permit; excepting, nevertheless, a part of what relates to the judiciary. On that subject conflicting opinions had been maintained with so much professional astuteness, that it became necessary to select phrases, which, expressing my own notions, would not alarm others, nor shock their self-love; and to the best of my recollection, this was the only part which passed without cavil."<sup>1</sup>

The general unanimity with which the judiciary article

<sup>1</sup> Spark's Morris, III, 323. Morris to Timothy Pickering, December 22, 1814.

finally passed should not lead us to believe that it was given, at the time, but one interpretation. For instance, the article declares that the jurisdiction of the national courts shall extend to all controversies "between a State and citizens of another State," but it does not declare that it extends to cases between a citizen of a State and another State. That some feared that this last interpretation of the power of the courts might be claimed for those of the United States, is clear from the speeches of George Mason in the Virginia convention,<sup>1</sup> and nowhere clearer than in Marshall's answer to Mason on this point. "With respect to disputes between a State and the citizens of another State, its jurisdiction has been decried with unusual vehemence. I hope that no gentlemen will think that a State will be called at the bar of a federal court. Is there no such case at present? Are there not many cases in which the Legislature of Virginia is a party, and yet the State is not sued? It is not rational to suppose that the sovereign power should be dragged before a court. The intent is to enable States to recover claims of individuals residing in other States. I contend this construction is warranted by the words. But, say they, there will be partiality in it if a State cannot be defendant—if an individual cannot proceed to obtain judgment against a State, though he may be sued by a State. It is necessary to be so, and cannot be avoided. I see a difficulty in making a State defendant which does not prevent its being plaintiff. If this be only what cannot be avoided, why object to the system on that account? If an individual has a just claim against any particular State, is it to be presumed that, on application to its Legislature, he will not obtain satisfaction? But how could a State recover any claim from a citizen of

<sup>1</sup> See pp. 118-121, ante.

another State, without the establishment of these tribunals?"<sup>1</sup>

That apprehensions, such as Marshall sought to allay, extended to New York, and to other parts of the Union, is clear from Hamilton's elaboration of Marshall's theory of the judiciary. "I shall take occasion to mention here," he writes in the *Federalist*, "a supposition which has excited some alarm upon very mistaken grounds. It has been suggested that an assignment of the public securities of one State to the citizens of another, would enable them to prosecute that State in the Federal courts for the amount of those securities; a suggestion which the following considerations prove to be without foundation. It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its own consent*. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the Convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article on taxation,<sup>2</sup> and need not be repeated here. A recurrence to the principles there established will satisfy us, that there is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no preten-

<sup>1</sup> Elliot, III, 555.

<sup>2</sup> The *Federalist*, No. XXXII.



sions to a compulsive force. They confer no right of action, independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident, it could not be done without waging war against the contracting State; and to ascribe to the Federal courts, by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable."<sup>1</sup>

From this contemporary exposition, considering its high source, it must be concluded that the framers of the Constitution did not intend to make it possible to "drag a sovereign State before a federal court." Rather it appears from the arguments of Marshall and Hamilton, that the Constitution guaranteed every State against being made defendant in any action that might be brought. By giving the State the right to bring action, in the federal courts, the Constitution was interpreted, by Hamilton and Marshall, as strengthening the States; for it put behind them the full authority of the general government. In one form or another, the argument ran through all the debates in the ratifying conventions, that the States would gain by assenting to the Constitution. Randolph, on presenting the Virginia plan, spoke of the jealousy of the States respecting their sovereignty as a fact familiar to all.<sup>2</sup> The records of the time, public and private, show that the predominating idea was that the States were sovereign. True or false, it was the ruling idea in 1788. That it was to prove false, under the test of administration, was not realized until 1865. But we must take ideas as we find them in the almanac of politics. Because

<sup>1</sup> The Federalist, No. LXXXI.

<sup>2</sup> Elliot, V, 127; Documentary History, III, in loco.

State sovereignty was the major premise of American politics in the eighteenth century, it does not follow that it was forever to hold this place in the civil syllogism.

Time might prove, as it has proved, that the premise was wrong, at least as a working political principle. Historically, however, the argument is with the State sovereignty school. The government of the United States was formed when the dogma of State sovereignty was supreme. We have seen how it dominated the thought of many of the framers of the Constitution and how it expressed itself without restraint in the ratifying conventions. In truth, no other dominating idea was then possible. The national idea must evolve; must be worked out by the harsh tests of administration. For it was when the State sovereignty dogma had proved destructive to the ends proposed so comprehensively in the Preamble to the Constitution,—“A more perfect Union,” “justice,” “domestic tranquillity,” “common defence,” “the general welfare” and the security of liberty, that the national idea was first comprehended by the American people. Crimination and recrimination cannot rewrite the past. Who can tell the price of liberty, or find a substitute for experience, or animate a people with ideas to which they have not grown? We are by race a conservative people, but a government cannot be administered solely on its history. Right or wrong, each generation must interpret the public business and, administering its own ideas, shoulder civil responsibility. The Fathers, as we affectionately call our early statesmen, were opportunists. So all public men must be in revolutionary times, and we seem to have such times most of the time. “I do not mean to say we are bound to follow implicitly in whatever our fathers did,” said Lincoln, in the Cooper Institute speech; “To do so would be to discard all the lights of current experi-

ence—to reject all progress, all improvement. What I do say is that if we would supplant the opinions and policy of our fathers in any case, we should do so upon evidence so conclusive, and argument so clear, that even their great authority, fairly considered and weighed, cannot stand.”<sup>1</sup>

That the Constitution was adopted with the understanding that a sovereign State could not be sued in a federal court cannot be doubted, if the complete evidence is duly weighed. Therefore, unless a State, by its constitution, authorized suits to be brought against itself, it could not be sued at all. In 1787, no State gave this authority. Five years later, Delaware, in its second constitution, declared that suits might be brought against the State as the law might prescribe, and Tennessee, in 1796, authorized such suits but limited the right of bringing them to its own citizens. These and some other States have repeated the provision in later constitutions.<sup>2</sup> But at the time when the national Constitution was made, the

<sup>1</sup> Lincoln's Works, I, 604.

<sup>2</sup> Delaware, 1831, 1894; Tennessee, 1834, 1870, in Bills of Rights. The Constitution of Arkansas, of 1874, Art. V, Sec. 20, declares that the State shall never be made defendant in any of her Courts. But see *Cursan vs. Arkansas, et al.*, 15 Howard, 30d, 309; *Clark vs. Barnard*, 108 U. S. 436, 447; *Beer's et al. vs. Arkansas*, 20 Howard, 527.

State constitutions authorizing legislation for bringing suits against the State:

Wisconsin, 1848, IV, 27; California, 1850, XI, 11; Kentucky, 1850, VIII, 6; 1890, Sec. 231; Indiana, 1851, IV, 24; Nevada, 1864, IV, 22; Missouri, 1865, IV, 21; Florida, 1868, IV, 19; 1885, III, 22; Mississippi, 1868, IV, 21; South Carolina, 1868, XIV, 4; 1895, XVII, 2; Alabama, 1867, I, 16; Pennsylvania, 1873, IX, 11; Washington, 1889, II, 26; North Dakota, 1889, I, 22; Wyoming, 1889, I, 8.

Bringing suit against a State is forbidden by:

Illinois, 1870, IV, 26; Alabama, 1875, I, 15.

common-law doctrine prevailed that a State, being the sovereign power, could be petitioned, but not sued. And the States were commonly understood to be the successors to the Crown.

When, therefore, in 1792, Alexander Chisholm, a citizen of South Carolina, brought suit against the State of Georgia in the Supreme Court of the United States, "a case of uncommon magnitude," to quote Justice Wilson's words, arose. "One of the parties to it," continued he, in giving the decision in the case, "is a State; certainly respectable, claiming to be sovereign. The question to be determined is, whether this State, so respectable, and whose claims soar so high, is amenable to the jurisdiction of the Supreme Court of the United States? This question, important in itself, will depend on others more important still, and may perhaps be ultimately resolved into one no less radical than this—"Do the People of the United States form a Nation?"

When we remember Gerry and Mason and Lee and Martin's antipathy to the word "national," in the earlier drafts of the Constitution, in the Federal Convention, and that they reflected the opinions of thousands of their countrymen less distinguished; when we remember the adroit compromises, on various occasions, by which the issue between State sovereignty and National sovereignty was avoided;—the boldness with which Wilson seized the issue before the Court becomes clearer. Passing by any possible errors in procedure, and passing, for a time, the particular matter before the Court, Wilson proceeded, apparently with joy, to answer the radical question: "Do the People of the United States form a Nation?"

He had already answered the question in his speeches in the Federal Convention, but his words there were heard only by a few, and in 1792, and for nearly half a

century longer, all its proceedings were still under the ban of secrecy.<sup>1</sup> The Supreme Court of the United States had not yet attracted public attention. Its justices, pure and able men, had been solicited by Washington to accept their offices. Its splendid history was all in the future. Suddenly a case had arisen, involving a small amount of money, but the gravest question with which the American people have had to wrestle. It was the first great constitutional case before the Court. Wilson examined the question from three points,—the principles of general jurisprudence, the laws of nations, and the Constitution. Developing the general notion of sovereignty from the first two, he proceeded to prove that the Constitution, by right, vested sovereignty in the United States, and explicitly vested the Court with jurisdiction over a State in the Union. The Articles of Confederation operated only upon States; not upon individual citizens. The Constitution had remedied this defect. The people of the United States intended to form themselves into a Nation for national purposes. They instituted, for such purposes, a national government complete in all its parts, with powers legislative, executive and judiciary, and, in all those powers, extending over the whole nation. Is it congruous that, with regard to such purposes, any man or body of men, any person, natural or artificial, should be permitted to claim successfully an entire exemption from the jurisdiction of the national government? Would not such claims, crowned with success, be repugnant to our very existence as a nation? “When so many trains of deduction, coming from different quarters, converge and unite at last in the same point, we may safely conclude,” said he, “as the legitimate result of this Constitution, that

<sup>1</sup> And they continued so till Madison's death in 1836.

the State of Georgia is amenable to the jurisdiction of this Court."

But it might be said that the language of the Constitution did not suffer that a State should be made a party defendant in the Court when the plaintiff was an individual. Both Marshall and Hamilton had argued that it did not. "But in my opinion," continued Wilson, as if replying to both, "this doctrine rests, not upon the legitimate result of fair and conclusive deduction from the Constitution; but it is confirmed, beyond all doubt, by the direct and explicit declaration of the Constitution itself." The Constitution provides that "the judicial power of the United States shall extend to controversies between two States." Two States are supposed to have a controversy between them; this controversy is supposed to be brought before those vested with the judicial power of the United States; can the most consummate degree of professional ingenuity devise a mode by which this "controversy between two States" can be brought before a court of law, and yet neither of those be a defendant? "The judicial power of the United States shall extend to controversies between a State and citizens of another State." Could the strictest legal language, could even that language which is peculiarly appropriated to an act, deemed by a great master to be one of the most honorable, laudable, and profitable things in our law; could this strict and appropriated language describe with more precise accuracy the cause now depending before the tribunal? Causes, and not parties to causes, are weighed by Justice in her equal scales; on the former, solely, her attention is fixed; to the latter she is, as she is painted, blind."<sup>1</sup> From all these inferences, Wilson decided that the State

<sup>1</sup> *Chisholm, Executor, vs. Georgia*, 1793. 2 *Dallas*, 419.

was suable and was amenable to the jurisdiction of the Court.

He was supported in his view by the Chief-Justice, John Jay, who, in the most elaborate, and most important of his decisions, after tracing the history of the country since the outbreak of the Revolution, gave a liberal construction to the Constitution. It was to settle controversies, because one of its objects was domestic tranquillity, and another, to promote the general welfare. With Wilson, he agreed that, as a controversy, the case fell within the exact language of the Constitution. But he went further than did his associate. "I perceive," said he, "and therefore candor urges me to mention, a circumstance which seems to favor the opposite side of the question. It is this: The same section of the Constitution which extends the judicial power to controversies "between a State and the citizens of another State," does also extend that power to controversies to which the United States are a party. Now it may be said, if the word party comprehends both plaintiff and defendant, it follows that the United States may be sued by any citizen, between whom and them there may be a controversy. This appears to me to be fair reasoning; but the same principles of candor which urge me to mention this objection, also urge me to suggest an important difference between the two cases. It is this: In all cases of actions against States or individual citizens the national courts are supported in all their legal and constitutional proceedings and judgments by the arm of the executive power of the United States; but in cases of actions against the United States, there is no power which the courts can call to their aid. From this distinction important conclusions are deducible, and they place the case of a State and the case of the United States, in very different points of view."

For these reasons Jay was of opinion that a State is suable by citizens of another State, but he was not prepared to say that such action lay where an individual sued a State on a bill of credit issued before the Constitution was adopted.<sup>1</sup>

But all this new doctrine was not suffered to pass without protest, and dissent. Justice Iredell, in one of the most famous of opinions, controverted Wilson and Jay, point by point, and gave legal expression to doctrines destined, in less than three years, to become the acknowledged creed of a great political party. More than this, it led to the amendment of the Constitution itself. He began by saying, that if the action could be brought against a State, it must be in virtue of the Constitution, and of the Judiciary Act of 1789. By the Constitution, the judicial power of the United States extends to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors or other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States and between a State and the citizens thereof and foreign States, citizens or subjects. The cases provided for in the Constitution in which a State is a party are of three classes: first, controversies between two or more States; second, controversies between a State and citizens of another State; and third, controversies between a State and foreign

<sup>1</sup> *Chisholm, Executor, vs. Georgia.* 2 Dallas, 419. (Decided in 1793.)



States, citizens or subjects. In all cases in which a State is a party, the Supreme Court has original jurisdiction.

The thirteenth section of the judiciary act of 1789, provided that "the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party except between a State and its citizens and except also between a State and citizens of other States or aliens, in which latter case it shall have original but not exclusive jurisdiction; and shall have exclusively all jurisdiction of suits or proceedings against ambassadors, or other public ministers or their domestics or domestic servants as a court of law can have or exercise consistently with the law of nations; and original but not exclusive jurisdiction of all suits brought by ambassadors or other public ministers or in which a consul or a vice-consul shall be a party." The Supreme Court has therefore exclusive jurisdiction in every controversy of a civil nature between two or more States, between a State and a foreign State; and where a suit or proceeding is depending against ambassadors, other public ministers or their domestics or domestic servants. The Court has original but not exclusive jurisdiction between a State and citizens of other States; between a State and foreign citizens or subjects; where a suit is brought by ambassadors or other public ministers and where a consul or vice-consul is a party.

The case pending before the Court, therefore, came within the description of a suit against a State, brought by a citizen of another State. And first, Justice Iredell distinguished between the cases that might come before a Court,—the Act of Congress particularly mentioning civil controversies in distinction from those of a criminal nature. What controversies of a civil nature could be maintained against a State by an individual? He thought that the framers of the Constitution must have meant one

of two things, either that in the conveyance of that part of the judicial power which did not relate to the execution of the other authorities of the General Government (which it must be admitted were full and discretionary within the restrictions of the Constitution itself) reference must be made to antecedent laws for the construction of the general words they used; or the framers intended to leave it to Congress in all such cases to pass all such laws as they might deem necessary and proper to carry the purposes of the Constitution into full effect. Attorney-General Randolph had taken the ground that the moment a Supreme Court is formed, it is to exercise all the judicial power vested in it by the Constitution by its own authority, whether or not the legislature has prescribed methods of doing so. From this view Justice Iredell dissented, conceiving that not merely was the organization of a Court to be determined by Congress, but also its authority and the manner of its procedure. The case before the Court was therefore one involving a construction of the provision in the Constitution which could not be interpreted without the aid of legislative authority. The Supreme Court was therefore the organ of the Constitution and the law, not of the Constitution only. In other words, the constitutional provisions respecting the Supreme Court were to be strictly construed. Granted that the interpretation of the Constitution depended upon an intervening act of Congress, it followed that unless such an intervening act specially applied to the case before the Court, the Court would have no jurisdiction.

At the time of the formation of the national Constitution, no State law authorized a compulsory suit for the recovery of money against a State; nor was any such law in force in the Commonwealths at the time of the passing of the Judiciary Act, in 1789. Though the assembly of

Georgia had passed an act authorizing a compulsory suit against the State for the recovery of money since the adoption of the judiciary act, its action could in no wise influence the construction of the act of Congress passed before. The only principles of law which the court could follow were those common to all the States. These were the principles of the common law. Unless superseded by special acts of legislature, the common law was in force in each State as it existed in England, unaltered by any statute, at the time of the first settlement of America. No alteration had been made by any statute in any of the American Commonwealths which could in any wise affect the case before the Court. "Every State in the Union," continued Justice Iredell, "in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign as the United States are in respect to the powers surrendered. The United States are sovereign as to all the powers of government actually surrendered; each State in the Union is sovereign as to all the powers reserved. It must necessarily be so because the United States have no claim to any authority but such as the States have surrendered to them. Of course, the part not surrendered must remain as it did before. The powers of the general government, either of a legislative or an executive nature, or which particularly concern treaties with foreign powers do for the most part, if not wholly, affect individuals and not States. They require no aid from any State authority. This is a great, leading distinction between the old Articles of Confederation and the present Constitution. The judicial power is of a peculiar kind. It is, indeed, commensurate with the ordinary legislative and executive powers of the general government and the power which concerns treaties but it also goes further where certain

purposes are concerned, although the subject in controversy does not relate to any of the special objects of authority of the general government wherein the separate sovereignties of the States are blended in one common mass of supremacy; yet the general government has a judicial authority in regard to such subjects of controversy, and the legislature of the United States may pass all laws necessary to give such judicial authority its proper effect.

So far as States under the Constitution can be made legally liable to this authority, so far, too, they are subordinate to the authority of the United States and their individual sovereignty is in this respect limited. But it is limited no farther than the necessary execution of such authority requires; the authority extends only to the decision of controversies in which a State is a party and to provide laws necessary for that purpose." Any question arising in the nature of a controversy in which a State is a party could be determined, according to Iredell, in no other manner than by a reference either to pre-existent laws or to laws passed under the Constitution and in conformity with it. He declared that Congress had proceeded upon the supposition that no such prior laws existed, and that the Constitution, in many respects, required legislation to make it effective. The Court in the case had a concurrent jurisdiction only, a jurisdiction original but not exclusive. The only courts with which such concurrent jurisdiction lay were the circuit courts or the courts of the different States. It could not be with the circuit courts, for admitting that the Constitution is not to have a restrictive operation so as to confine all cases in which a State is a party exclusively to the Supreme Court (an opinion to which Justice Iredell was strongly inclined), yet, there were no words in

the definition of the powers of the circuit court which gave color to an opinion that where a suit is brought against a State by a citizen of another State, the circuit court could exercise any jurisdiction at all. If they could have such a jurisdiction by the very terms of their authority, it could be only concurrent with the courts of the several States.

From this, Justice Iredell concluded that the act of Congress was the limit of the authority of the Supreme Court, and, consequently, that the Court had no authority except such as could be consistently exercised by the proper State court. As the principles of the laws existing before the Constitution of the United States were in the opinion of the Justice, to guide in the determination of this case, he inquired whether an action like that before the court could have been maintained against one of the States in the Union upon the principles of common law. If such an action could be maintained on these principles, then it could be maintained in the Supreme Court. "Now, I presume," continued he, "it will not be denied that in every State in the Union previous to the adoption of the Constitution, the only common law principles in regard to suits that were in any manner assumable in respect to claims against a State, were those which in England apply to claims against the Crown; there being certainly no other principles of the common law which previous to the adoption of this Constitution, could in any manner or upon any color apply to the case of a claim against a State in its own courts, where it was solely and completely sovereign in respect to such cases at least."

His opinion therefore involved two propositions; that the Supreme Court of the United States had no jurisdiction of the case and that a sovereign State can not be sued. The first proposition was based upon his inter-

pretation of the Constitution and of the Judiciary Act; his second, upon English precedent. At great length he entered into an examination of these precedents and concluded that the king could not be sued in all actions as a common person and that in those actions in which by precedent, suit might be brought against him, there was no precedent applicable to the case before the Court. The king might be petitioned but not sued. There was no process known to the law by which the king could be compelled to be a defendant. If any of the precedents could be construed as showing authority for maintaining a suit against a sovereign, it was a construction to be drawn from royal grace and not from royal necessity. The only remedy for the recovery of debts due from a sovereign was by petition which must receive the express sanction of the sovereign, otherwise, there could be no proceeding upon it. If the debt contracted was avowedly for the public uses of the government, it was at least doubtful whether remedy by suit would lie. And if it would, it remained afterward in the power of Parliament to provide or not to provide for the payment of the debt.

In applying these English precedents, Iredell considered the State as sovereign, the successor to the king. The claim of a debt due from a State could arise in three cases only; first, in case of a contract with the legislature itself; second, in case of a contract with the executive, or any other person, by the express authority of the legislature; or, third, in case of a contract with an executive without any special authority. The contract in the first and second cases would be made on the public faith alone. "Every man must know that no suit can lie against a legislative body. His only dependence, therefore, can be that the legislature on the principles of public duty will make a provision for the execution of their own contracts,

and if that fails, whatever reproach the legislature may incur, the case is certainly without remedy in any of the courts of the State." No English precedent was authority that a petition to the Crown would lie in cases under contracts made with the Parliament, or with the Crown, by virtue of parliamentary authority. In other words, there was no English precedent for a compulsory suit against a State because its legislature had made a contract and had not fulfilled it. There was no similarity between a contract with the governor of a State made without special authority and a contract made with the Crown in England. "The Crown there has very high prerogatives, in many instances is a kind of trustee for the public interests, in all cases represents the sovereignty of the kingdom and is the only authority which can sue or be sued in any manner on behalf of the kingdom in any court of justice. The governor of a State is a mere executive officer; his general authority from analogy limited by the Constitution of the State, with no undefined or indisputable prerogatives, without power to affect one shilling of the public money but as he is authorized under the Constitution, or by a particular law, having no color to represent the sovereignty of the State so as to bind it in any manner to its prejudice, unless specially authorized thereto. And therefore all who contract with him do it at their own peril and are bound to see (or take the consequences of their own indiscretion) that he has strict authority for any contract he makes.

Of course such a contract, when so authorized, will come within the description mentioned of cases where public faith alone is the ground of relief and the legislative body the only one that can afford the remedy which, from the nature of it, must be the fact of its discretion and not of any compulsory process. If, however,

any such cases were similar to those which would entitle the party to relief by petition to the king, in England, that petition being only presentable to him as he is the sovereign of the kingdom, so far as analogy is to take place, such petition in the State could only be presented to the sovereign power, which surely the governor is not. The only constituted authority to which an application could with any propriety be made, must undoubtedly be the legislature, whose express consent upon the principle of analogy would be necessary to any other proceeding. So that this brings us, though by a different route to the same goal, the discretion and good faith of the legislative body." By all principles of the common law, therefore, Justice Iredell concluded that a State could not be sued.

But had the laws of Congress so affected the sovereignty of an American State as to make it suable? He maintained that a State is not made subject to the judicial power of Congress. Such a construction could only be allowed at the utmost upon the supposition that the judicial authority of the United States, as it respected States, could not be effectuated without proceeding against them in that light, a position which Iredell by no means admitted. Admitting that the States ought to be considered as subject to the judicial power of Congress, an act of the legislature was necessary to give effect to such a construction unless the old doctrine concerning corporations would naturally apply to the case before the court. It was evident that the act of Congress had not made any special provision in this case grounded on any such construction. Therefore, Justice Iredell was perfectly clear "that we have no authority upon any supposed analogy between the two cases to apply the common doctrine concerning corporation to the immediate case before the court." There were in his opinion "the most essential



differences between the old cases of corporations, to which the law intimated has reference, and the great and extraordinary case of the States separately possessing, as to everything simply relating to themselves, the fullest powers of sovereignty, and yet in some defined principles subject to the superior power composed out of themselves for the common welfare of the whole."

In its largest sense the word, corporation, had a more extensive meaning than was popularly given to it; any body politic was in this sense a corporation. Parliament itself was a corporation; not only each State but even the United States without impropriety might be called corporation. But there were differences between such corporations and the several States in the Union discernible when these States and the United States were considered in their relations. "A corporation is a mere creature of the king, or of Parliament, very rarely of the latter, most usually of the former only. It owes its existence, its name and its laws (except such laws as are necessarily incident to all corporations merely as such) to the authority which creates it. A State does not owe its origin to the government of the United States in the highest or in any of its branches. It was in existence before it. It derives its authority from the same pure and sacred source as itself: the voluntary and deliberate choice of the people. A corporation can do no act but what is subject to revision either of a court of justice or of some other authority within the government. A State is altogether exempt from the jurisdiction of the courts of the United States, or from any other exterior authority, except in the special instances where the general government has power derived from the Constitution itself. A corporation is altogether dependent on that government to which it owes its existence. Its charter may be for-

feited by abuse. Its authority may be annihilated without abuse by an act of the legislative body. A State, though subject in certain specified particulars to the authority of the government of the United States, is in every other respect totally independent of it. The people of the State created, the people of the State only can change its constitution. Upon this power there is no other limitation but that imposed by the Constitution of the United States: that it must be of republican form." Any other construction than this, in the opinion of Justice Iredell, "would make courts arbitrary and in fact makers of new laws instead of being, as certainly they alone should be, expositors of an existing one."

As, in his opinion, there existed no law, which reduced a State to the condition of a municipal corporation, he knew of no authority by which a court in an extra-local decision could reduce a State to such a condition. From his opinions we draw the conclusions that the Constitution so far as it defined the judicial authority of the United States could only be carried into effect by acts of Congress appointing courts and prescribing their procedure; as Congress had provided no new law, in this respect reference must be expressly made to the old law: the common law of England. No principles of the old law, either by precedent or by analogy, authorized the Court to have jurisdiction of the case before it. Therefore the suit in question could not be maintained. A State could not be sued.<sup>1</sup>

There is a close analogy between Iredell's opinion and the political doctrine developed during colonial times and expressed imperfectly in the various plans for Union.<sup>2</sup> Each of these plans, it will be remembered, was founded

<sup>1</sup> *Chisholm, Executor, vs. Georgia, et cetera.*

<sup>2</sup> See Chapter VI of Book I, Vol. I.

upon the idea that the Crown was the source of government in America; that each colony derived its political existence from the specific grant duly set forth in some royal charter. Essential to this idea was that of the independence of each colony with respect to every other and the dependence of all the colonies upon the Crown. In the evolution of federal government each colony became a State and the strict federal doctrine of government defined this State not only as independent of every other State, but as independent of all the States forming the Government of the United States. This federal doctrine maintained that there was a difference between a State, as a legal entity, and the people of a State. It attributed to the State as a legal entity a sovereignty succeeding the sovereignty of the British Crown. The legal argument in defense of this idea naturally was founded on the common law. It was compelled in putting the State in the place of the Crown to attribute to the State all those qualities which had previously been attributable to the Crown. It therefore, in basing the doctrine upon the precedent of the common law and upon the rights of the British Crown had made no provision for any reorganization of the powers of the government necessary to the administration of them according to republican principles of government. It sought to engraft a republican form of government on the root of monarchy. It enthroned a new king,—the sovereign corporation of the State. It eliminated the individual from the modern State. It conceived of the rights of men but not of the rights of a man. It functionized the individual in the civil corporation and, carefully defining its rights, privileges and immunities, omitted to define his. Therefore Iredell, and all who found their political views upon his interpretation of the force of civil factors, strictly following the course of the

common law and of the precedents in monarchical government, logically and carefully define the functions of the civil corporation in America but wholly neglect to define the place and power, the rights and immunities, of the individual who is the essential element in government, and who is the only power in the State qualified to functionize the State as a political entity:

But in spite of this current application of the principles of the law and the precedents of English monarchy in the colonies, there evolved in them necessarily the principles of a National Government and of the place and power of the rights and immunities of the individual citizen in that government. The State sovereignty concept is essentially legal and monarchical; the concept of national sovereignty is essentially organic, economic, and also legal, but its legality is principally that expressed by statutes defining rights and relations determinable by political experience and not as determinable wholly by the English precedents of common law. This political experience is itself the constant economic adjustment of the people and is essentially the evolution of democracy; so that it may be said that in contradiction to the State sovereignty or monarchical idea of government, the national idea of government is democratic. In other words, the normal idea of government is democratic. All governments constantly tend toward this form. A strict adherence to the principles of common law not only in their application in courts of justice but also in administration in America in colonial times would never have evolved a national independent American Government; for the independence of America, tested by the principles of the common law, was essentially a treasonable act. A strict application of the principles upon which the doctrine of State sovereignty is based would never have

evolved the idea that all men are created equal, for the precedents in the application of those principles had already made permanent social distinctions in the British monarchy. The abolition of such distinctions and an inhibition of a revival of them as set forth in the Constitution of the United States were contrary to the course of the common law and themselves evidence of a new age in legislation. The national idea of government in America is founded upon an organic conception without precedent, in all its parts, in the common law. This political organism which we call the Nation, is founded upon the concept of the political equality of human beings, of their individual rights and powers, privileges and immunities and of the reflex action upon them of the operations of the general government which they have created.

In the evolution of American democracy, the national idea assumed clearness in the public mind as soon as the necessities for a more perfect union became clear. This necessity could not be felt until the limitations, the imperfections, the meaningless precedents, the absurd fictions of the common law as strictly applied in monarchical institutions, were experienced in the new world. The principal cause for the evolution of the national idea has been economic. The practical newness of our system of government, the equalizing labors necessary to reduce a wilderness to a continent of homes, at last compelled the administration of the general government according to the principles of nationality.

But though Iredell had given an epoch-making opinion, it was not the decision of the Court. The American States were suable in Federal courts: that was the startling and the official conclusion of the whole matter. The fathers were reversed; the ideas of the framers ignored; the Federalist rejected by one of its authors. True, Jay

had said "that the sovereignty of the nation is in the people of the nation and the residuary sovereignty of each State is in the people of each State." But this did not save State sovereignty. So far as the decision impaired it, it must be corrected. Georgia, with promptness passed an act fixing the death penalty on any one who should attempt to carry out the decision of the Court. Massachusetts, alarmed at the prospect of becoming the prey of creditors, expostulated against the decision and urged remedial action. New York and Maryland also protested.<sup>1</sup> The Chisholm decision was handed down on the eighteenth of February, 1793. On the next day, Sedgwick, of Massachusetts, gave notice in the lower House of Congress, that he should soon move a resolution for amending the Constitution so as to protect the States from being sued in Federal courts.<sup>2</sup> On the twentieth, the amend-

<sup>1</sup> Maryland, *Van Stophorst vs. Maryland*, 2 Dall. 401; (New York) *Oswald vs. New York*, 2 Dall. 401, 415; *Vassal vs. Mass.*, Commented on by Hildreth, IV, 409, 446; Pitkin II, 335, 341. Compare Elliot II, 212, 382; III, 480, 485; IV, 167; American Law Review, XII, 625.

<sup>2</sup> Sedgwick anticipated the action of his own State fully seven months. The subpoena in equity in *William Vassal, complainant, vs. The Commonwealth of Massachusetts*, issued February 11, 1793, from the Supreme Court of the United States, at Philadelphia (Jay, C. J.); Samuel Bayard, Clk., and was served on John Hancock, Governor, and James Sullivan, Esq., Attorney-General of the State. The Governor called a special session of the General Court, which assembled September 18, 1793, and, in his address to the two Houses, discussed the question of the suability of a sovereign State by an individual (in re *William Vassal*). The question of the suability of a State (settled by the decision in *Chisholm vs. Georgia*), the Governor thought should be "properly, satisfactorily and finally settled." He doubted the truth of the doctrine sustained by Wilson and Jay, in the *Chisholm* decision, and held that it was not the original intention of the framers and supporters of the Constitution to make it possible that a State could be brought as party defendant, as in the case of *Chisholm vs. Georgia*. (Resolves of the General Court of the Commonwealth of Massachusetts, began and held at Boston, in

ment, nearly in the form it was at last given, was offered in the Senate.<sup>1</sup> But the year passed and the amendment slumbered. On the second of January it was again proposed in the Senate,<sup>2</sup> was discussed on the thirteenth,<sup>3</sup> and, after an unsuccessful effort of Gallatin to amend it,<sup>4</sup> was passed, on the fourteenth, by a vote of twenty-the county of Suffolk, on Wednesday, the 29th day of May, A. D., 1793.) (See also Edition, 1895, pp. 699-703.) The General Court, on September 27, 1793, by resolution declared against the doctrine of the suability of a State, as laid down by the Supreme Court of the United States in *Chisholm vs. Georgia*, and instructed the Massachusetts Senators, and requested the Representatives of the State, in Congress, "to adopt the most speedy and effectual measures in their power to obtain such amendments in the Constitution of the United States as will remove any clause or article of the said Constitution which can be construed to imply or justify a decision that a State is compellable to answer in any suit by an individual or individuals in any Court of the United States," and Governor Hancock was "requested to communicate the foregoing resolves to the Supreme Executives of the several States, to be submitted to the consideration of their respective Legislatures." *Ibid.*

The ground of the resolutions was that the doctrine of suability as laid down in *Chisholm vs. Georgia* was "dangerous to the peace, safety and independence of the several States and repugnant to the first principles of a federal government." *Ibid.*

Governor Hancock, using the current expression of the times, declared the *Chisholm* decision a "dangerous precedent," and that "a consolidation of all the States into one government would at once endanger the nation as a Republic and eventually divide the States united." *Ibid.*

<sup>1</sup> Eleventh Amendment, first draft, February 20, 1793. (*Annals*, 651.)

"The Judicial power of the United States shall not extend to any suits in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

<sup>2</sup> *Id.*, 25.

<sup>3</sup> *Id.*, 29.

<sup>4</sup> Gallatin's proposition was:

"The Judicial power of the United States, except in cases arising under treaties made under the authority of the United States,

three to two. On that day it was read in the House for the first time; and on the fourth of March, the House, having resolved itself into a Committee of the Whole, on the matter, and further amendment having been rejected,<sup>1</sup> the Senate resolution was adopted by a vote of eighty-one to none.<sup>2</sup> It was before the State Legislatures nearly three years, and its ratification was announced by President Adams on the eighth of January, 1798.<sup>3</sup>

shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." (January 14, 1794. *Annals*, 30.)

Another form of the amendment proposed on this day:

"The Judicial power of the United States extends to all cases in law and equity in which one of the United States is a party; but no suit shall be prosecuted against one of the United States by citizens of another State, or by citizens or subjects of a foreign State, where the cause of action shall have arisen before the ratification of this amendment." (Ib.) Taken from Virginia Amendment, No. 14, *Elliot*, III, 661.

The nearest precedents for the XIIth Amendment among the amendments by ratifying Conventions were:

1788, Virginia, Amendment No. 14, *Elliot*, III, 661.

North Carolina, Amendment No. 15. *Documentary History*, II, p. 272.

The Virginia and North Carolina amendments were alike and gave the United States Courts jurisdiction in cases arising after but not before the ratification of the Constitution. There is no direct precedent for the XIIth amendment.

<sup>1</sup> This amendment (rejected by 77 to 8, March 4, 1793. *Annals*, 476) was: to add to the resolution as it came from the Senate the words:

"Where such State shall have previously made provision in their own courts whereby such suit may be prosecuted to effect."

The amendment as it was passed by the Senate (second and final draft):

Same as Constitution, Article XI. Amendments.

<sup>2</sup> *Annals*, 477.

<sup>3</sup> *Messages and Papers of the President*, Richardson, I, 260.

The record at the Department of State, of the ratification of the Eleventh Amendment, seems to be incomplete. It contains



It is to be observed that, the amendment, as adopted by both Houses, followed Gallatin's phraseology. The ratifying convention had asked for amendment of the article on the judiciary and that proposed by Virginia may be taken as a type of their requests; it was the substance of the amendment which was rejected, along with Gallatin's. The absence of any immediate and clear precedent for the amendment, indicates that none of the States anticipated any such decision as was given by Wilson and Jay, in *Chisholm vs. Georgia*. No comment on the amendment is more informing than that by the Supreme Court itself in a decision, given by Justice Bradley nearly a century later.<sup>1</sup> The decision by Wilson and Jay, says Bradley, "created such a shock of surprise throughout the country that at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed and was in due course adopted by the Legislatures of the States. This

official notice of ratification by Virginia, Kentucky, Maryland, Connecticut, North Carolina and South Carolina, with no record of the action by other States.

See Documentary History of the Constitution, II, pp. 392-407. See also Journals of House and Senate, 3rd Cong., 2nd Sess.; 4th Cong.; 5th Cong.

On the 24th of February, 1797, Congress passed a joint resolution requesting the President to ascertain what States had ratified the Eleventh Amendment (Annals, 1796-1797, 2284). On the 12th of October, President Adams wrote to Pickering, Secretary of State:

"There is a law, or resolve, requesting the President to write to the governors of the States for information whether they have adopted the amendment to the Constitution relative to the suability of States. I know not but you may have executed this resolution; if not, I beg you would write without loss of time, lest a noise should be made at the opening of the next session, and we should be charged with neglect of duty."

Life and Works of John Adams, VIII, 552.

<sup>1</sup> *Hans vs. Louisiana*, 134 U. S. 1. (1889).

amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and courts, actually reversed the decision of the Supreme Court. It did not in terms prohibit suits by individuals against the States but declared that the Constitution should not be construed to import any power to authorize the bringing of such suits. The Court itself so understood the effect of the amendment, for, after its adoption, Attorney-General Lee submitted this question to the Court,<sup>1</sup> "whether the amendment did, or did not, supersede all suits against any one of the United States by citizens of another State?" Tilghman and Rawle argued in the negative, contending that the jurisdiction of the court was unimpaired in relation to all suits instituted previously to the adoption of the amendment. But on the succeeding day, the court delivered a unanimous opinion, "that the amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a State was sued by the citizens of another State, or by the citizens or subjects of any foreign State."<sup>2</sup> Thus it may be said the Constitution was corrected, the Supreme Court overruled and brought into line with public opinion, and the ancient right of petition to the sovereign instead of a compulsory process was sustained as the proper remedy.

Whatever opinions may now be held of the basis of Iredell's opinion, that distinguished jurist, whom Washington had elevated to the bench after reading his speeches in the ratifying convention of North Carolina in support of the Constitution, holds the unique place in our history of rendering an opinion, and that a dissenting one, which speedily became the constitutional basis of the Democratic

<sup>1</sup> *Hollingsworth vs. Virginia*, 3 Dall. 378.

<sup>2</sup> *Hans vs. Louisiana*, 134 U. S., p. 1.

party, and also was one of the principal causes leading to the adoption of an amendment to the constitution. If Hamilton and Marshall be accepted as expositors of the Constitution, Iredell's opinion expressed the original intention of its framers.

The debates in the Federal Convention show the difficulties which were encountered in determining the method of choosing the President.<sup>1</sup> Here the Convention forsook State precedents, rejected the methods of earlier republics and, at last, after much revision of its first plan, adopted one resting entirely on political theory. The method followed by Maryland in choosing State senators by a body of special electors may have suggested the electoral college for choosing a President, but direct evidence that Maryland gave the precedent is slight and the two methods have little in common. The difficulty was to choose a national officer by federal methods. Had the new government been wholly federal, in its origin, scope and operation, an election by the State legislatures, as in case of Senators, was the proper method. Had the government been wholly national, the proper procedure was by a popular election. But being a mixed government, partly national and partly federal, the election of the executive was made in conformity with the fusion, and thus became a compromise. That the compromise gave general satisfaction is evident from the discussions and opinions of the ratifying period. "The mode of appointment of the Chief Magistrate of the United States," writes Hamilton in the *Federalist*, "is almost the only part of the system, of any consequence, which has escaped without severe censure, or which has received the slightest mark of approbation from its opponents."<sup>2</sup> Even Richard

<sup>1</sup> See Vol. I, ante, pp. 324, 350, 364, 369, 446, 448, 452, 462, 463, 468, 546, 547, 563, 564, 570.

<sup>2</sup> No. LXVIII.

Henry Lee, the most zealous and irreconcilable opponent of the Constitution, after pronouncing the Vice-President "not a very important, if not an unnecessary part of the system,—he may be a part of the Senate at one period, and act as the supreme executive magistrate at another," added, "The election of this officer, as well as of the President of the United States seems to be properly secured."<sup>1</sup>

The Constitution provided<sup>2</sup> that the electors should meet in their respective States and vote by ballot for two persons, of whom one, at least, should not be an inhabitant of the same State with themselves. They made out a list of all persons voted for, and of the number of votes for each, and sent this, sealed and certified, to the capital, directed to the President of the Senate. In the presence of both Houses, this officer opened all the certificates and the votes were then counted. The person having the greatest number of votes was thereby President, if the number was a majority of the whole number of electors. If more than one person had a majority, and an equal number of votes, the House of Representatives should immediately, by ballot, choose one of them for President. If no person had a majority, then, from the five highest on the list, the House, in like manner, should choose the President; but in choosing him, the votes should be taken by States, the representation from each State having one vote. A quorum for this purpose should consist of a member, or members, from two-thirds of the States, and a majority of all the States was necessary for a choice. In every case, after the choice of President, the person having the greatest number of votes of the electors should be the Vice-President. If there remained two or more with

<sup>1</sup> Letters of a Federal Farmer, III.

<sup>2</sup> Art. II, 1: 3.

equal votes, the Senate should by ballot choose the Vice-President from them.

Here was no intimation of any nomination of candidates, either for President or Vice-President. The issue of an election was ever uncertain. There was no designation of the electoral vote, for either office. The end was reached by events almost accidental. Whatever the reasons that finally led the Convention to adopt this procedure, it may be assumed that the prospective power of party organization and of political alliances and schemes, did not weigh with the members as factors likely to deflect the electoral choice from fit characters for the two offices. It is not strange that Lee, and other opponents of the Constitution, pronounced the Vice-President a superfluous officer. The Convention imposed great confidence in the stability of the presidential electors. No hint of collusion among them, or of bargain and corruption is suggested in the debates. The choice of the Chief Magistrate was to be a federal act. Each State should appoint its electors. A choice by the people, though advocated by Wilson, was never seriously considered by the Convention. The electors acted for the States and were to give the people a President and a Vice-President. In case two persons received, each, a majority and the same number of votes, the House, voting by States, should elect the President, and if there remained two with equal votes, the Senate, a federal body, should elect the Vice-President. Thus, whether the electors, or the House chose the President, the act was a federal act. When an election proceeded in, what may be termed, the usual way, the Vice-President was chosen, as it were, by remainder, or *ex officio*: as he might have been President, and the person, made President, might have become Vice-President, by the change of a few votes. When the choice of President

devolved upon the House, the person having the second greatest number of electoral votes became Vice-President, but in case there were several persons having the same number, the choice was by the Senate,—a federal body.

As long as Washington lived and would continue in the Presidency, no one else was thought of, but the distribution of the electoral vote, in 1789, among twelve persons,<sup>1</sup> in 1792, among five,<sup>2</sup> and in 1796, among thirteen,<sup>3</sup> indicated that, unless public opinion was loud and clear for one person for President, the number of candidates was ever likely to be large, the electoral vote to be divided, and a choice by the House, the rule, instead of the exception. It was a condition that could not well have been anticipated by the framers of the Constitution.

The national sentiment was feeble all through Washington's administration, and it gained little strength during the administration of John Adams. The common speech of the day, the usual language of debate in Congress and in the State legislatures, described the States as "Free, sovereign and independent." Therefore, whatever tended to disturb, or to diminish, State equality excited greater alarm than any threat or disturbance of the national government. But the sign of possible discord in the election of a Chief Magistrate was likely to be detected by supporters of what was then called, a federal or consolidated plan of government. Certainly an election by the House was not desirable, if for no other reason than that it was not an election by the electors appointed by the State legislatures. The election of 1796 occurred on the eighth of November, and it was some time in doubt whether Adams, Jefferson or Pinckney would be chosen President.

<sup>1</sup> *Annals*, 17.

<sup>2</sup> *Annals*, 2nd Congress, 645.

<sup>3</sup> *Annals*, 4th Congress, 2nd Sess., 1543-1544.

On the eighth of January, 1797, William Smith, of South Carolina, offered a resolution in the House, for an amendment to the Constitution that would remedy the great inconvenience that might arise from the prescribed mode of choosing the President and Vice-President and that would carry into effect the real intention of the electors;<sup>1</sup> they should be directed to designate for whom they voted as President, and for whom as Vice-President; but the resolution received no further attention than to be ordered to be printed. A month later, the electoral vote was counted, and John Adams, the Vice-President, announced as the result of the vote, seventy-one votes for John Adams, sixty-eight for Thomas Jefferson, and one hundred and thirty-seven votes divided among eleven other persons. In the election of 1796, the electors were appointed by the legislature, in six States<sup>2</sup> and chosen by the people, in ten. There were no nominations of candidates, no conventions, no political platforms. Not one State gave its full vote for Adams and Jefferson; and four that cast votes for them<sup>3</sup> also voted for six others.<sup>4</sup> Adams received the full electoral vote of eight States; Jefferson, of four; Pinckney, of five; Burr and Ellsworth, each, of two, and Clinton, of one.<sup>5</sup>

Considering the strength and the prevalence of State

<sup>1</sup> *Annals*, 1824.

<sup>2</sup> Conn., N. J., N. Y., Del., S. C., Ga.

<sup>3</sup> Pa., Md., Va., N. C.

<sup>4</sup> Pinckney, Burr (Pa.); John Henry (Md.); Pinckney, Burr, Samuel Adams, Geo. Clinton, Washington (Va.); Pinckney, Burr, Iredell, Washington, C. C. Pinckney (N. C.).

<sup>5</sup> For Adams, N. H., Mass., R. I., Ct., Vt., N. Y., N. J., Del.

For Jefferson, Pa., Ky., Tenn., Ga.

For Pinckney, Vt., N. Y., N. J., Del., S. C.

For Burr, Ky., Tenn.

For Ellsworth, N. H., R. I.

For Clinton, Ga.

sovereignty notions, in 1796, and the manner of choosing the President then prevailing, it is not strange that dissatisfaction should be expressed with a political system which gave the country a President who was the first choice of only eight States in sixteen, and a Vice-President who was the unanimous choice of only four,—and yet between whom and the President there was the difference of only three votes. The result displeased the Federalists, for they had planned to elect Adams and Pinckney, and this displeasure at the system chiefly affected the Federalist region which lay north and east of Pennsylvania, to which Delaware must be added, for its vote was solid for the two leading Federalists, Adams and Pinckney. In Pennsylvania, and in States to the south and southwest the vote, though much divided, was mostly for Jefferson and Burr, and throughout this southern half of the country there was more or less dissatisfaction with the constitutional provision for choosing the President and Vice-President. Moreover, though there were no formal platforms or nominations, there was not lacking a clear and common understanding that Adams and Jefferson represented two, widely differing, political schools. The anomaly of a Federalist President and a Democratic-Republican Vice-President, at the same time, increased political apprehensions in both parties.

That a month before the counting of the electoral vote, in 1797, a resolution was offered to amend the Constitution so as to direct the electors to designate their choice for President and Vice-President, is evidence that the public mind was not at rest on the subject. But Smith's resolution was quite forgotten, and three years had passed and Adams' stormy administration was drawing to a close, when, on the sixteenth of February, 1799,<sup>1</sup> Abiel

<sup>1</sup> *Annals*, 2919.



Foster, a Representative from New Hampshire, offered a like resolution, which was ordered to be printed; but two weeks later, the House by a vote of fifty-six to twenty-eight, negatived his motion to refer the resolution to a Committee of the Whole on the state of the Union. On the twenty-third of January, 1800,<sup>1</sup> James Ross, of Pennsylvania, moved for a Special Committee to report a bill for deciding disputed elections of President and Vice-President. Three days later, the Committee reported one which passed to a second reading on the fourteenth of February, which was debated and amended, and passed the Senate on the twenty-eighth of March. It was taken up in the House on the sixteenth of April, was discussed till the first of May, was then amended and passed on the second. It was amended by the Senate, was sent back to the House, and, by a vote of seventy-three to fifteen, was there rejected on the ninth.

The defeated measure attempted no more than to regulate the procedure in case of a disputed election. While on its progress, the question of amending the Constitution, in the matter of electing President and Vice-President, again came before the House,—on the fourth of February, in the form of a substitute for the existing constitutional provision, providing like the propositions offered by Smith and Foster, for a designated electoral vote. It was referred to the Committee of the Whole, but no further action was taken. On the fourteenth of March, John Nicholas, of Virginia, submitted a resolution to the House for amending the Constitution, proposing that after the third of March, 1801, the choice of the electors of President and Vice-President should be made by dividing each State into a number of districts equal to its number of electors. But no action was taken

<sup>1</sup> *Annals*, 29.

till the twenty-first of November, when this resolution was referred to a Select Committee, which, on the twenty-second of January, 1801, made an elaborate report that no change from the method prescribed by the Constitution was expedient.<sup>1</sup>

Meanwhile the Presidential election of 1800 had occurred, its results were known and the first case of a failure to choose a President had arisen. Federal intrigues to make Pinckney President and to bring Adams to the second place not only weakened the party, but ultimately overwhelmed Hamilton, their principal instigator, with disaster.<sup>2</sup> The formal vote of the electors, on the

<sup>1</sup> Annals, 941-946.

"The most favorable event would certainly be the division of every State into districts for the election of electors; with that single point, and only common sense in the administration, Republicanism would be established for one generation, at least, beyond controversy; but if not obtainable as a general constitutional provision, I think that our friends, whilst they can, ought to introduce it immediately in New York." (Referring to the approaching Constitutional Convention, which assembled at Albany, October 13, 1801).

Gallatin to Jefferson, September 14, 1801.

Adams' Gallatin, I, 51.

"The district mode was mostly, if not exclusively, in view when the Constitution was framed and adopted, and was exchanged for the general ticket and legislative election, as the only expedient for baffling the policy of the particular States which had set the example."

Madison to Hay, August 23, 1823.

Madison's Works, III, 334.

"The amendment to the Constitution of which you speak would be a remedy to a certain degree. So will a different amendment which I know will be proposed, to-wit,—to have no electors, but let the people vote directly, and the ticket which has a plurality of the votes of any State to be considered as receiving thereby the whole vote of the State."

Jefferson, in reply to Gallatin, above, September 18, 1801. Jefferson's Works, VIII, 94.

<sup>2</sup> See Life and Works of John Adams, I, 576-597.

eleventh of February, 1801, gave seventy-three votes to Jefferson; seventy-three to Aaron Burr; sixty-five to John Adams; sixty-four to Charles Cotesworth Pinckney, and one to John Jay. The electors had failed to choose, and the election of a President devolved, by the provision of the Constitution, on the House. Before Wednesday, the twelfth, had passed, the House cast nineteen ballots, but without result. On the eighteenth, at one o'clock, the thirty-sixth ballot was taken. Ten States voted for Thomas Jefferson; four, for Burr, and two cast blank votes.<sup>1</sup> By this vote, Jefferson was President, and Burr, having the same number was Vice-President. Thus events had demonstrated that the inconveniences discussed during the last three years were not problematical, but, as many believed, substantial. At the election of 1800, sixteen States voted, and in eight,<sup>2</sup> the electors were chosen by the legislatures. In the remaining eight, they were chosen by the voters.<sup>3</sup> But the mere method of obtaining electors had no bearings on the final issue. The electors of Connecticut were appointed by its legislature and they voted for Adams and Pinckney; the South Carolina electors, appointed in the same manner, voted for Jefferson and Burr. The New Hampshire electors, chosen by the voters of that State, cast their ballots for Adams and Pinckney; the electors of Kentucky and Tennessee, also chosen directly by the people, voted for Jefferson and Burr.

On party lines, the Union was divided into eight Republican and six Federal States; the remaining two being

<sup>1</sup> *Annals*, 1021-1033.

<sup>2</sup> Vermont, Connecticut, New York, New Jersey, Pennsylvania, Delaware, South Carolina, Georgia.

<sup>3</sup> In 1789 the electors were chosen by the legislature in Conn., N. J., Dela., Pa., S. C., Ga. In 1792, in Conn., N. J., Pa., Dela., S. C., Ga.

partly Federal, partly Republican. Again, there were no platforms or conventions, but Adams and Pinckney were the recognized Federalist candidates; Jefferson and Burr, the Democratic-Republican. Testing the final choice by the electoral vote of the States, the result expressed the will of the country more perfectly than did the election of Adams and Jefferson in 1796. There remained one fact, most distressing to the Federalists, that they had not succeeded in bringing either of their candidates into office. The conviction spread, too, that the election in the House had been effected by collusion. Mingled with this rumor, which many Federalists took no pains to correct, were the mutterings of the friends of Burr, who had confidently expected his election to the Presidency. In brief, the method of choosing the Chief Magistrate was suddenly confused with the animosities, the ambitions, the schemes and the disappointments of partisans. It was no longer solely a constitutional question, but strictly a question of politics. Engendered by whatever cause, the idea gained ground that the Constitution had proved defective in an essential part and that it must be amended. "I have been above all things solaced," wrote Jefferson about a month after the election, "by the prospect which opened on us, in the event of a non-election of a President; in which case, the federal government would have been in the situation of a clock or watch run down. There was no idea of force, nor of any occasion for it. A convention, invited by the Republican members of Congress, with the virtual President and Vice-President, would have been on the ground in eight weeks,—would have repaired the Constitution and wound it up again."<sup>1</sup> As the Senate consisted of nineteen Democratic-Republicans and thirteen

<sup>1</sup> Jefferson to Priestly, March 21, 1801. Works, (Ford's Ed.) VIII, 22.

Federalists; and the House, of seventy-one Republicans and thirty-four Federalists, the "republican members on the ground" were a factor to be reckoned with. A constitutional amendment, if made a strictly party measure, was sure of passing, and none the less sure because it might be directed by the first American statesman who also was one of the most astute politicians the world has ever known.

Another year passed before further effort to amend the Constitution with respect to the election of President and Vice-President was made. On the twelfth of April, 1802, Dewitt Clinton, in the Senate, submitted an amendment that the persons voted for as President or Vice-President, "be particularly designated."<sup>1</sup> Three days later, the amendment districting the States for electors, was again proposed, but later was postponed till the next session of Congress. Meanwhile the House had been hearing amendatory propositions. Benjamin Walker, a New York member, on the fifteenth of February, presented the joint resolutions of the New York Legislature on the subject;<sup>2</sup> and on the nineteenth, the districting amendment, providing also for a designation of the candidates was again proposed, and, with the New York resolutions, was referred to the Committee of the Whole. Joint resolutions from the legislature of North Carolina were presented by the eloquent John Stanley, a representative from that State, and were referred, but they were not reached in Committee of the Whole till the first of May, when the two proposed amendments were for the first time discussed. But the debate was brief and chiefly on the expediency of taking up the matter so near the close of the session. However, the amendment to desig-

<sup>1</sup> Annals, 259.

<sup>2</sup> Annals, 509.

nate the candidates was carried, on the second, by a vote of forty-seven to fourteen, and, on the following day, was read in the Senate. By a vote of fifteen to eight, the Senate refused to concur.<sup>1</sup> The House was informed of this action, and Congress adjourned. But the defeated amendment was presented again on the third of January, by Leib, of Pennsylvania, who remarked that his constituents were extremely anxious on the subject. On the eighth of February, Bayard of Delaware, moved that the House go into committee on the subject; Griswold, of Connecticut, renewed the motion on the ninth, but the House finally, without a division, discharged the Committee from any consideration of the two amendments that had been referred to it and no further action was taken during the session.

When, for a long period of time, the same propositions come up before Congress, whether originating among its members, or with State legislatures, or with constituencies, they will at last be heard. On the seventeenth of October, 1803, when the Eighth Congress assembled, it was nearly six years since Smith, of South Carolina, had offered his resolution to the House that the Constitution be amended so as to direct the electors to designate the candidates voted for as President and those voted for as Vice-President. On the first day of the session, John Dawson, of Virginia, renewed this old motion, and on the following day, the House, in Committee of the Whole, set itself seriously to its consideration.<sup>2</sup> Dawson's amendment merely directed the designation of the electoral votes; Nicholson, of Maryland, detecting the uncertainty that would prevail if the amendment went no further, as the Constitution provided that after the choice of Presi-

<sup>1</sup> Annals, 304.

<sup>2</sup> Annals, 8th Cong., 1st Sess., 372.

dent, the person having the greatest number of votes should be Vice-President, wished Dawson's amendment changed so that the person receiving the highest number of votes for Vice-President should thereby be elected, unless the vote for two or more was equal, in which case the Senate should choose. Clopton, of Virginia, wished the choice, if to be made by the House, limited to two candidates, instead of five, as the Constitution provided, and this should apply to the election in the Senate, also. On the twentieth, the amendatory propositions on Nicholson's motion, was referred to a Committee of Seventeen,—one from each State,—of which Dawson was chairman. To this committee the amendment for districting the Union for electors was also referred.

A question of procedure arising, the Speaker, Nathaniel Macon, of North Carolina, decided that according to the usages of the House, a simple majority was competent to decide all matters preliminary to the final adoption of amendments.<sup>1</sup> Dawson, on the twenty-second, offered a revision of his amendment, embracing Clopton's idea, but limiting the choice to the three highest on the list, in cases when the election went to the House; but to two, when the Vice-President was chosen by the Senate. The Select Committee, two days later, reported Dawson's last amendment, but the limitation of the House to three candidates, instead of five, was at once objected to as a limitation of the rights of the small States. The great object of the amendment, remarked Sanford, of Kentucky, "ought to be to prevent persons voted for as Vice-President from becoming President; other innovation upon the Constitution was improper. No danger could arise from extending the right of the House to making a choice from the five highest." Caesar Rodney, of Delaware, agreed

<sup>1</sup> *Annals*, Id., 381.

with Goddard, of Connecticut, that five would allow a larger choice than three, and thus favor the small States.

In defense of the report, Dawson explained, that the committee did not think three a discrimination because when both President and Vice-President were voted for without discrimination, the choice was made from five. Campbell, of Tennessee, had remarked that by limiting the number to three, the choice would nearer approach the will of the people. "What is this will," inquired Goddard, "but the will of the large States, Virginia, New York and Pennsylvania?" When it was known that the election might go to the House, the people would choose their Representatives accordingly. "The fewer the number of candidates," replied Alston, of North Carolina, "the less chance that the House would be called upon to make the choice." On the twenty-sixth, the committee reported a resolution which was agreed to by the House. The candidates should be designated; and in case no person was chosen President by the electors, the House should elect from the three highest on the list. If no Vice-President was chosen, the Senate should elect from those highest on the list and having an equal number of votes. But the friends of the number five made it the issue, on the following day, when, by a vote of fifty-nine to forty-seven, it was inserted; and the amendment, as now changed, was ordered engrossed and passed to a third reading.

On the twenty-eighth the debate of the measure began.<sup>1</sup> This debate is no less interesting for its bearing upon the immediate question than for the interpretation it gives of the nature of the Constitution, and the light it throws on the scope and operation of that instrument, as understood in the opening years of the new century. In 1803, most

<sup>1</sup> Id., 515.



of the framers of the Constitution were still living, and many of them were in public life. But the men who were proposing and discussing the twelfth amendment were of a later generation, to whom the Constitution came as the heritage of the country from Revolutionary times. To the surprise of many, the Constitution had proved itself well adapted to the needs of America. But no one should think that the Constitution seemed to Congressmen in 1803, as it seems to Congressmen in our day. It was not yet associated with the defeats and triumphs of administration extending over many years. Its makers were still living, and the passions of 1787 were not all allayed by its ratification. Jefferson had spoken of it as a clock that might run down, and many Federalists believed that some of its mechanism had stopped on the day when he was chosen President by the House of Representatives. To many Senators and Congressmen of 1803, the Constitution was a law not differing, profoundly, from other laws. Public sentiment has long since come to venerate it as the supreme law of the land. Whatever the word Constitution may mean to the mass of Americans, at least, it stands for power and permanency, and supreme political wisdom, and a supreme law almost impossible to change. The twelfth amendment following its predecessors within five years, and, indeed, proposed before the eleventh had yet been proclaimed to be a part of the Constitution, suggested the thought to many that the nineteenth century might possibly revise the work of the Federal Convention, and that party demands might rewrite the Constitution.

On Friday, the twenty-eighth of October,<sup>1</sup> Griswold, of New York, rising, after the manner of Congressmen, to give the reason for his opposition to the proposed amend-

<sup>1</sup> 1803; *Annals*, 515, 8th Cong. 1st Sess.

ment, because it would "materially affect the smaller States in the choice of President," defined the Constitution as "a compact formed by the several States for the general good," a concept of the Constitution which was commonly held at the time, and, indeed, until the nineteenth century was in its last quarter. "In no other place than on this floor," said he, "are the smaller States on an equal footing with the larger in the choice of the President." It followed that the greater the chance of bringing the States to a vote in the House, the more advantageous it would be for the smaller States. For them an election by the House was an exercise of that sovereignty of which they were so jealous. The more the Constitution was examined, the greater the admiration of its principles. The mode originally provided for the election was the least liable to call forth art, intrigue and corruption, because the uncertainty of the result made all evil plans difficult of execution. Adopt the proposed amendment, and the door to corruption was opened. Moreover it was an unhappy time to alter the Constitution, when the public mind was agitated by party rage. By altering it for every trivial pretext, all sacred regard for it would be destroyed.

What is the Constitution, asked Huger, of South Carolina, other than a "compact, a bargain, a perfect compromise of interests, powers, influence and rights:—a federative government agreed upon between thirteen distinct and separate sovereignties, for their mutual defence and protection?" The inhabitants of the United States, in forming the Constitution, did not, he said, act in mass as one people.<sup>1</sup> The men who framed it did not, even in the degree of members of the House, immediately represent the people. "They were not selected by the people

<sup>1</sup> *Annals, Id.*, 522.

at large, nor did they represent them in their individual capacities." "They were sent to represent the interests and views of thirteen distinct sovereignties; were appointed by the governments of the different States and held their authority from the States." When met therefore, in convention, "their object was not to form one general consolidated government for the inhabitants scattered over this vast territory, but to modify still further, and to draw still closer the bands of alliance by which the States were already connected." One of the chief objections to the Constitution was its violation of the federative principle,—that it "approached too nearly to a consolidation of the different members of the Confederacy, and one general national government." Finally, when ratification was the issue, the point on which the fate of the Constitution rested was that point which balanced the great and the small States.

The difficulty, in detail, was to determine how much of State sovereignty was yielded to the Union. Representation was not fixed on mere numbers; that would have put an end to State sovereignty. As a partial check, the federative principle was preserved in the States; and in the House, to a certain extent, also. If the chief executive was to be chosen on the republican principle, instead of the federative, he would be the creature of the large States. The compromise finally agreed upon, provided for his election by States, not by the people at large. "I have ever understood, I have ever been taught to believe, by those few of the original framers of the Constitution with whom I have had the happiness to be acquainted, or to converse on the subject, that this very provision which obliges the electors in each State to vote indiscriminately for two persons to fill the offices of President and Vice-President, and which it is now pro-

posed to do away, was regarded as the best, the most effectual means, and that which did in fact tend most to soothe and quiet the fears of the smaller States, and was in this view, and for this very purpose, adopted as a part of the Constitution."

The proposition to change the manner of election was therefore "neither more nor less than a State question," one involving the vital principle upon which the Federal compact was formed; the compromise between the large and the small States. By the Constitution, the House, voting as equal States, could make its choice of five candidates; by the amendment, the choice, the electors in the larger States by agreeing on their candidates would always bring them in. By the Constitution, the smaller States always had a chance of securing the Vice-President. It should not be forgotten that the person elected President would usually be a man advanced in years; the Vice-President,—the heir apparent, would succeed. Moreover it should be remembered that the Vice-President participated in the high functions of the Senate, the treaty power, the confirmation of executive appointments. The amendment would give a death-blow to the sovereignty reserved to the States and prove "a monstrous and more than a gigantic stride" towards their consolidation.

Huger remarked that he was not on popular ground; that the principles for which he contended no longer influenced the public as they did when the Federal Convention met. Nor were they regarded in the small States as formerly. The prosperity which the country had enjoyed under the General Government had done away, in a very considerable degree, with State jealousies. It was not true that the public demanded the amendment. It had been worked up by party zeal and its ultimate suc-

cess depended upon continuing that irritation "so industriously kept up since the late contested election of the President." Hastings, of Massachusetts, reminded the House that if the Constitution was to be amended, the article authorizing the representation of slaves, as it operated with peculiar inequality in the Northern and Eastern States, ought first to receive consideration. To this, Matthew Lyon replied that he would have kept silence if the old subject of irritation had not been brought up: for himself, although he had once represented a free State and now represented Kentucky, he believed that the sacrifice, which some complained of in the Constitution, was on the part of the people where slavery was admissible. "The blacks who are slaves are much more useful and beneficial to the community and to the nation, according to their number, than those that are free."<sup>1</sup> Without further debate the resolution was adopted by a vote of eighty-eight to thirty-one.

While this resolution was in progress in the House, the Senate had been discussing a similar amendment. Dewitt Clinton, on the 21st of October,<sup>2</sup> had brought forward an amendment, which he said, expressed the will of the State of New York and of other States, on the necessity of designating the electoral votes. It was made the order for the following day. Bradley, of Vermont, wished it further amended so that a majority of the electoral votes should be requisite for a choice of the Vice-President. If no choice was made, the Senate should elect; Butler, of South Carolina, wished a further amendment, making a person ineligible to the Presidency for more than four years in any eight. The whole was referred to a Select Committee of Five. It reported, on the twenty-fourth, when

<sup>1</sup> *Annals*, Id., 554-555.

<sup>2</sup> *Id.*, 16.

Dayton, of New Jersey, moved to strike out all providing for a Vice-President. This would solve the problem and prevent jealousies, natural between the President and the heir-apparent. John Quincy Adams remarked that the discriminating principle was well understood among the people, but the question of abolishing the Vice-Presidency was new. It might be well to consider it. But there was a general request for further consideration and Dayton, agreeing, cited the first of Madison's twelve amendments, proposed in 1789, on regulating representation in Congress, which, impracticable, absurd and a striking monument of legislative haste as it was, yet lacked only one or two States to add it to the Constitution. Not until the twenty-third of November was the subject resumed, when a tedious debate ensued, whether two-thirds of the whole Senate or of the members present could pass an amendment. It was decided that two-thirds of those present could act, and with this conclusion, the Senate proceeded to consider the report of the committee.

After rejecting both five and two as the number from which the House might choose, three was agreed on, though Adams urged five, as the House had already accepted that number.<sup>1</sup> He further suggested an objection, that the acquisition of Louisiana made a change in the amendment necessary, because there was no alternative but to admit those born there as well as those born in the United States, to the right of being chosen President and Vice-President. Butler replied, citing the late treaty, that the people of Louisiana were naturalized citizens,<sup>2</sup> a fact which disposed of their candidacy. But as to the immediate question, it was a reasonable principle, that each State, in its turn, should have the choice of the Presi-

<sup>1</sup> *Annals*, Id., 85.

<sup>2</sup> *Treaties and Conventions*, 332.

dent from among its citizens. Let the smaller States agree to this amendment, and the larger would forever choose both President and Vice-President. The change would violate the compact of the Union. True, it had been said, that if the amendment was not adopted, the Federalists would elect the Vice-President, and this, as everybody knew, was the pivot upon which the whole matter turned. Ought the Republicans, now in power, to do an act which, out of power, they had loudly condemned? But the report was adopted by a vote of twenty to eleven.

The debate, which followed in the Senate, differed little from that heard in the House. Smith, of Maryland, asserted that by limiting the choice of the House to three candidates, the will of the people would more likely be carried out. Who did not remember the recent election, when it had been seriously discussed, that in case no choice were made, a President should be created by a special law, leaving out of consideration the votes of the electors, and ignoring public opinion? Was not a civil war seriously apprehended? If a person had been found to accept the Presidency under such conditions, "his head would not have remained on his shoulders for twenty-four hours afterwards." Hillhouse, of Connecticut, defended the existing provision, as it had been defended in the House. "If the amendment pass," said he, "nine out of ten times the election will go to the other House, and then the only difference will be that you had a comedy the last time and you will have a tragedy the next." The conflicting interests of large States and small had been apparent all through the government. Federal and Republican parties had had their day; new parties would arise. If the confidence, under the compromises of the Constitution, existing between the small States and the large, was once

broken, civil war might follow.<sup>1</sup> Why not elect President and Vice-President by a majority vote? asked Bradley, on the twenty-fourth; the Vice-President being, in certain cases the successor to the President, the two officers should be chosen by the same ratio of votes. And he wished, in case the electors failed to choose a Vice-President, that the Senate should elect from the two highest on the list. His suggestion was rejected, but, after some discussion, he renewed it, because he wished to prevent the office of Vice-President from being "hawked about to the highest bidder." Hillhouse agreed with him, and reminded the Senate that there was not a word in the Constitution about voting for a Vice-President, and the discriminating principle ought surely to apply to that office.

Wright, of Maryland, supported Bradley and cited the resolutions of New Hampshire in 1799<sup>2</sup> adopted, with slight alteration by Massachusetts in the following year, in favor of amending the Constitution, as the precedent for his plan; though he wished the discriminating principle to apply to both President and Vice-President. Bradley's suggestion was then adopted.

Adams again objected to the number three, and, on motion of Cocke, of Tennessee, the number was left blank. This precipitated a debate whether the change from five to a less number would diminish the rights of the smaller States, or tend to defeat the popular will, or encourage intrigue and corruption,—or, in the majority of cases, give the election to the House. Maclay, of Pennsylvania, took the unusual view that whether the number was five or three, the effect of the amendment would be to bring the Constitution into line with the State constitutions, and to conform the election of President and Vice-President

<sup>1</sup> Id., 90.

<sup>2</sup> Id., 95, where they are reprinted.



to the practice of the States in the choice of their executives.<sup>1</sup> On the twenty-fifth, without debate, it was agreed that the vote in the House should be by States,—following the language of the original clause of the Constitution, on this point; and also, that the choice of the Senate should be restricted to the two highest numbers on the list. Thus far little had been said in support of the Constitution as it originally stood, but there were some Senators who wished no change, and among them, Pickering, of Massachusetts, the late Secretary of State; who, with a mind not unfamiliar with "high-Federal views," remarked that much had been said about the will of the people, but how could it be ascertained? From the newspapers? From private society? From resolutions of legislatures? Better avoid mere innovation. To his mind, the number three conformed more to its spirit than the number five, but it was best to preserve the federative and popular principles, on which it rested, unimpaired. He believed it to be the intention of the Constitution that the people should elect the President and Vice-President, directly. But finally, by a vote of twenty-one to ten, the number three was agreed to.<sup>2</sup>

This conclusion, however, did not end difficulties. How should the House decide between several candidates, say four or five, having an equality of votes? At this point, so many amendments were offered that it was decided to have them printed in order that the Senate might discover how the matter stood. On the following day, Dayton moved to strike out all relating to the Vice-President. This was pronounced out of order. Adams hinted that he had a number of amendments which he thought of pro-

<sup>1</sup> The State practice was, in most instances, for the Legislature to choose by a majority vote, in joint ballot.

<sup>2</sup> Annals, November 29, 1803, 8th Cong., 1st Sess., 123.

posing. Pickering moved to amend so that the House be given twenty-four hours in which to choose the President, after which an election should be made "according to law." This led Tracy, of Connecticut, to remark, that Pickering's motion would lead to a dozen explanatory amendments, to which the Massachusetts Senator replied that the President might be chosen by lot, or the names of the candidates be put in a box from which the Speaker might draw one. "Why not throw dice for the office, the highest number to win it?" asked Smith.<sup>1</sup>

Adams objected to the existing provision in the Constitution because it left the choice too much to mere lot, and he offered an amendment that in case the House did not choose within a fixed number of days, then the Vice-President should act as President, but in case that office was vacant, the succession should fall upon whomsoever the law might direct. Wright at once reminded Adams that it would be impossible to put anyone over the Vice-President when he had become President. It will be remembered that as yet no Vice-President had succeeded to the Presidency because of the death of a President and it was not as yet understood that he would be more than an acting-President. Indeed, very vague opinions of his functions, title and powers prevailed. Might it not be necessary in the amendment under consideration, to provide for a vacancy in the office of Vice-President as well? The succession provoked sufficient agitation to lead Wright to say that "we do not wish to see a man seated in the Executive chair whom the people never contemplated to place there, and who never had a vote."<sup>2</sup> To clear up the matter, Taylor, of Virginia, proposed that in case the House failed to elect a President, when the choice

<sup>1</sup> *Annals*, Id., 130.

<sup>2</sup> *Annals*, December 1, 1803, 135.

on the amended report, it was again decided to insert the number three, instead of five, and to omit the proposition limiting the period for which a President could be elected and the resolution, in its amended form, passed by a vote of twenty-two to ten. At half past nine, in the evening, the final vote was taken that the resolution pass,—the division being the same as last made, which the Vice-President, Burr, declared to be a two-thirds vote;—and the amendment was sent to the House with a request for its concurrence.<sup>1</sup>

Two resolutions for amendment had now been passed: the House resolution sent to the Senate on the twenty-eighth of October, and the Senate amendment, sent to the House on the first of December. The House measure retained the original provision of the Constitution that in case the election went to the House, the choice should be made from the five highest on the list; the Senate amendment limited the choice to three, and in case no President was chosen by the House before the fourth of March, the Vice-President should become President: otherwise, the two resolutions were similar. On the sixth of December, the House made the Senate resolution the order of the day.<sup>2</sup> Griswold, of Connecticut, thought the Senate's inattention to the resolution sent up to it a grave act of discourtesy to the House. He objected to the Senate amendment because it had not been passed by a constitutional number of Senators. Everybody knew that the Senate consisted of thirty-four members and that twenty-three constituted two-thirds of them, but only twenty-two Senators had voted for the resolution.

A long debate followed on the meaning of that pro-

<sup>1</sup> *Annals*, Id., 210; December 3, 1803.

<sup>2</sup> *Annals*, Id., 646.

vision in the Constitution regulating the vote when amendments are proposed: Did it mean that the vote must be by two-thirds of the Senate, or by two-thirds of the Senators present? The journals of Congress were searched. Randolph, of Virginia, discovered that some of the amendments of 1789 did not receive the support of two-thirds of the House. Ought they therefore to be expunged from the Constitution? Rodney told his colleagues that by the Constitution each House kept a Journal, determined its own rules and regulated its own proceedings. By what authority then could the House judge the Senate? The new amendment came to the House from the Senate through its legitimate organ, the clerk. Was one House thus to watch the other? "The Constitution is predicated on the moral integrity of the two Houses, and without such confidence in them, it cannot exist for a day."

Finally, it was decided, by a vote of eighty-five to thirty-four, that the Senate amendment should be taken up, its enactment, by the Senate, having proceeded, in the opinion of that body, in a constitutional manner, of which the Senate itself was final judge.<sup>1</sup> Thus was settled, early in the history of the Government, a principle in Congressional legislation which the Constitution recognizes among the States, that full faith and credit shall be given to the public acts, records and proceedings, of one branch of Congress by the other.

On the seventh, Huger, of South Carolina, wished the districting amendment to be taken up with that from the Senate. Griswold, of New York, agreed with him, but not because the Legislatures of New York and South Carolina had proposed the amendment. Senators might

<sup>1</sup> *Annals*, Id., 663; December 6, 1803.

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be thus instructed, but a representative was the voice of a portion of the people of a State and in no wise bound by legislative instructions. By the Constitution, the election of a President was three degrees removed from the people; electoral districts and a direct vote were needed. But several members, among them Rodney, objected to incorporating different subjects in the same resolution as likely to endanger all, and by a vote of more than two to one, it was decided to consider the Senate amendment only. Elliot, of Vermont, moved to strike out the clause declaring the Vice-President President, in case the House made no choice before the fourth of March, and for the reason that it introduced a person to the Presidency "not contemplated by the people or the electors." This feature and the number three instead of five as the limit of choice in the House distinguished the Senate resolution from that of the House. Huger, Chittenden, of Vermont, Skinner, of Massachusetts, and Lowndes, of South Carolina, agreed with Elliot. "As I consider this amendment as a grave for the whole business, I shall vote against it," said Smilie, of Pennsylvania. It was the old question of large States against small; "five" against "three" in the amendments. Dana, of Connecticut, wished to abolish the office of Vice-President. The discriminating principle being adopted, he believed that a dangerous source of competition would be avoided. Did not the Journal of the Federal Convention show that originally there was no idea of a Vice-President, but that it was explicitly agreed that the Senate should choose its own President? The necessity of a Vice-President did not suggest itself until the idea of a double ballot was introduced. In one point the members of the Convention were agreed, that the Supreme Executive should consist of one person, but as to the manner of appointing him,

his term, his re-eligibility, a great diversity of opinion prevailed. The first plan was that he be chosen by the National Legislature, by joint ballot; then it was proposed that he be elected by the people, or by electors appointed by the State legislatures, or appointed by the people. All these propositions were disagreed to till the principle of a double ballot prevailed. Why not follow State precedents and allow the Senate to choose its presiding officer? Abolish the office of Vice-President. It would become the lure to designing men.

Griswold, of Connecticut, agreed that if the discriminating principle was adopted, the office of Vice-President was unnecessary. Indeed, abolish that office, and the discriminating amendment itself would be needless. But only thirty-four members took this view and it did not prevail. So the attack on this office ceased. Objection was then made to the number three in the Senate amendment. A sharp debate followed on the verbal construction of the clause that the election should be made from the "persons having the highest number, not exceeding three." Though the chairman assured the house that the word, number, was a misprint for numbers, Griswold protested against the ambiguity of the passage. Randolph remarked that whatever way the passage read, no sense could be made of it. Sanford, of Kentucky, suggested its meaning. "It is a task of delicacy," observed Elliot, "to decide whether the gentlemen from Kentucky, Connecticut, or Virginia, is the best grammarian," but he thought that Randolph was at least most ingenious. "No instrument is so perfect," replied Rodney, "that if the parts are taken separately, it may not be rendered nonsense," and he illustrated with the story of the sailor, who, happening to be at church, heard the clergyman



recite one of the Psalms, in the old version by Sternberg and Hopkins,—that the congregation might sing:

“The Lord will come, and he will not—

Keep silence, but speak out.”<sup>1</sup>

Thinking preacher and congregation crazy, the sailor quickly left the house. “So in this case,” concluded Rodney, “gentlemen, by a similar species of ingenuity, may make this or any other resolution perfect nonsense.”

The majority of the House was intent, however, on finishing the business. They refused to let the committee rise; they refused to strike out the passage pronounced ambiguous and by a vote of seventy-five to twenty-six, agreed to the Senate resolution without amendment. By a larger majority they refused to adjourn and by a still larger one, refused to entertain any amendment for the abolition of the Vice-Presidency. Goddard then moved to substitute “five” for “three,” but it was lost by a vote of eighty-five to thirty-two.<sup>2</sup> Griswold, of New York, then proposed to amend by allowing the Senate to choose the Vice-President from three instead of two candidates, but the motion was rejected without a division. The Senate amendment was then divided and the first part, containing the provision for designating the electoral vote, passed by a vote of eighty-five to thirty. The other clauses were then agreed to, and Macon, the Speaker, put the question on the whole resolution. Elliot warned the House that it was about “to increase tenfold the probability of introducing a person into the Presidency not calculated for that office, and to increase the avenues by which corruption and ambition may be advanced to supreme power.” If, in the future, the people of America should feel under the necessity of lamenting over their

<sup>1</sup> *Annals*, 681, December 7, 1803.

<sup>2</sup> *Annals*, *Id.*, 683.

departed liberties, they could date the destruction of the Constitution, the work of so much labor and wisdom, from the passage of this amendment. But Elliot alone had this gloomy vision; the resolution was agreed to and the question stood on engrossing it for a third reading. The Federalist members, for whom Griswold spoke, wished it delayed till the next day. Randolph moved for a final reading immediately. By a majority of twenty-nine, the House rejected Griswold's motion, and by one of forty-three carried Randolph's.

This was not a strictly party vote, for the Democrats had a majority of sixty-five, in a full house. It was now late in the afternoon, but the House refused to adjourn. Purviance, of North Carolina, concisely stated the objections to the amendment, now finally before the House. It would injure the smaller States by limiting the choice to three, instead of five persons, when the election was made by the House. It made the executive office a matter of bargain and sale. It retained the office of Vice-President, when the original reasons for it had ceased. And, finally, it was an innovation on the Constitution. If it was adopted, not a session would pass without other amendments, until the whole system would be destroyed. Randolph spoke for the resolution. It was not the best possible, but the best that could be had. The Vice-Presidency ought to have been abolished, but to this the Senate had not consented, neither would it consent to the number five instead of three. The original resolution of the House was preferable to this from the Senate, but it could not be passed. Yet this contained the designating principle, which, after all, was the principal thing. The possibility that the Senate would ever elect the President was remote. If the small States believed themselves injured by the amendment, they could refuse to ratify it.

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One of Randolph's chief objections to the Constitution was "the difficulty of obtaining desirable amendments, which increases with the increasing number of States." Instead of "opening an endless source of venality and intrigue," the amendment would prove a "death-blow" to all corruption.

On the eighth the debate of the concurrent resolution was resumed, and Gregg, of Pennsylvania, reviewed its history. For nearly six years the matter, he said, had been under discussion. The Legislatures of New Hampshire, Vermont, Massachusetts, New York, Ohio, Kentucky and Tennessee had invited its adoption. The public demanded it, therefore it should be passed. Lowndes and Randolph and some other believers in State sovereignty again outlined its doctrines. Of national sovereignty little was said, because as yet little was known.

But Campbell, of Tennessee, advanced national ideas seldom uttered and rarely believed in those days. "I am of opinion," said he,<sup>1</sup> "that our Government was formed by the people of the United States, in their capacity as such, by their immediate representatives in the General Convention, and not by the several States convened in their State capacities. The words of the Constitution are, "We, the people of the United States," and not "We, the United States, in our State capacity," which, I presume, would have been the language used had the framers of the Constitution intended to have formed a Government for the States united in their State capacities; and though the State interests, as such, are regarded in our Government and their sovereignties represented, whereby it may be considered as partaking in some degree of the federative principle, yet this will not prove our Constitution to be a Confederation of States, in the extent

<sup>1</sup> *Annals*, Id., 718-727; December 8, 1803.

contended for in their State capacities; but only shows that the framers of the Constitution intended, by thus regarding the State rights and sovereignties as such, to qualify and limit the operations of the General Government with regard to the several State Governments and their respective interests and rights. The laws that are made by the General Government are binding on the people of the United States at large, and not on the State Governments; for though the State Governments are limited by and bound not to violate the Constitution of the United States, yet they certainly cannot be controlled or in any manner bound by the legislative acts of the General Government. This, I conceive, shows, in a very strong manner, that the Union is not a mere Confederation of States." The joint resolution, he believed, was demanded and would be "joyfully hailed by nine-tenths of the American people."

To Campbell, Thatcher, of Massachusetts, replied, that the Constitution was adopted by States acting in their corporate capacity, and that the resolution could not be adopted "without, in fact, destroying the very basis of the Confederacy."

At last the debate came to an end. States' rights, State sovereignty, the Constitution a compact between the States, the dangers of intrigue and corruption incident to an election, the merits of three over five and of five over three, as the number from whom the House might choose; the use and the uselessness of the office of Vice-President; the public will; the danger of innovations on the Constitution, all were touched on and the vote was taken. Forty-two stood for the resolution and forty-two against it. The casting vote of Nathaniel Macon, the Speaker, carried the amendment.<sup>1</sup> On the following day,

<sup>1</sup> *Annals, Id.*, 776.

the twelfth of December, the Senate concurred and the joint resolution went to the States for ratification.<sup>1</sup>

Its progress through the State legislatures was rapid. On the twenty-fifth of September, James Madison, the Secretary of State, formally proclaimed that the amendment had been ratified by three-fourths of the States and it became a part of the Constitution.<sup>2</sup>

Its adoption may be said to have completed the Constitution as a piece of eighteenth century work. When the first ten amendments were adopted by Congress, all the framers of the Constitution, save one, were living. Eleven of them were then members of the Senate<sup>3</sup> and eight were members of the House.<sup>4</sup> One of the framers was President of the United States, and his signature was affixed to the joint resolution for twelve amendments that went out to the States, on the twenty-fifth of September, 1789. The eleventh amendment was adopted by Congress on the fifth of March, 1794. During its discussion, nine of the framers were members of the Senate,<sup>5</sup> and five, of the House,<sup>6</sup> among whom was James Madison. During the six years in which the twelfth amendment was under consideration, seven of the framers were Senators, and four were members of the House.<sup>7</sup>

<sup>1</sup> *Annals*, Id., 214.

<sup>2</sup> For the ratification of the Twelfth Amendment by the States, see *Documentary History of the Constitution*, II, 411-451. It was rejected by Connecticut. See Id., 427. Also, *Journals of House and Senate*, 1803-4, in loco.

<sup>3</sup> Langdon, Strong, W. S. Johnson, Ellsworth, R. Morris, Few, Patterson, Bassett, Reed, Butler, King.

<sup>4</sup> Gerry, Gilman, Sherman, Madison, Clymer, Carroll, Fitzsimons, Baldwin.

<sup>5</sup> Langdon, Strong, Ellsworth, Sherman, King, Read, Butler, Few, Bassett.

<sup>6</sup> Gilman, Gerry, Fitzsimons, Madison, Baldwin.

<sup>7</sup> Senators: Dayton, G. Morris, C. Pinckney, Langdon, A. Martin, Baldwin, Butler;

Representatives: Gilman, Dayton, Madison, Baldwin.

At the time of its adoption by the Eighth Congress, Jonathan Dayton, Pierce Butler and Abraham Baldwin were in the Senate. None of the framers belonged to the House, but thirty-four were still living. The individual vote of Senators on the first ten amendments is not recorded, but it is known that some of the Federalist members thought little of them. The six framers who were members of the House and voted on the first ten amendments, supported them, and the eleventh was supported, in the Senate, by Ellsworth, Butler, King, Langdon, Martin and Strong; and in the House, by Baldwin, Gilman and Madison. Fitzsimons in the House, voted against it. In 1803, in the Senate, Baldwin voted for, and Butler against the twelfth amendment.

Thus the record shows that only two of the framers, among the twenty-three who were members of Congress at some time during the period the first twelve amendments were under discussion and who had an opportunity to record their opinions, voted against them. The attitude of John Quincy Adams to the twelfth amendment, in the form in which it passed the Senate, and his vote against it, chiefly because it limited the House to a choice from three instead of from five candidates, are of interest in the light of his later history. The second disputed election occurred in 1824, when the electoral vote was divided among four candidates, Jackson, Adams, Crawford and Clay. By the twelfth amendment, the House could not vote for Clay, because he was the fourth on the list. Had Adams's wishes prevailed, in 1803, and the number remained five, as in the original Constitution, and as the House amendment provided, undoubtedly Henry Clay would have been chosen over Jackson, Adams or Crawford. The decision of Congress, in 1803, proved, in the case of Adams, that it is an ill wind that



does not blow somebody some good. Made so soon after the original instrument, these twelve amendments have long seemed, in the popular mind, of equal antiquity.

Turning to their sources, the first ten, are clearly, as Jefferson declared they ought to be, a Declaration of Rights, and each may be said to have emanated from a common source, the State constitutions, or the "ancient and undoubted rights" of Englishmen. Some of them, as we have seen, go back to the Great Charter; others, to the Petition of Right; and one, to the famous Bill of Rights enacted in the time of William and Mary.<sup>1</sup> At least eight went back to the Declaration of Independence, and three, to the older Declaration of 1765. But the two immediate sources were the State Constitutions and the amendments sent up by the ratifying conventions. Here was the quarry out of which nearly all were hewn. The eleventh and twelfth amendments, being eventually administrative in character, could not have any such origin as the first ten. They were devices; opportunist measures, originating in party policy and carried through as party measures. Posterity will hardly agree with Gouverneur Morris, that, these amendments are "generally speaking, mere verbiage."<sup>2</sup> They have so long been a part of the Supreme Law, their amendatory character long since disappeared. They seem to be the work of Franklin and Washington and Wilson and Madison and

<sup>1</sup> See the note, p. 206.

<sup>2</sup> "How far have the amendments to the Constitution altered its spirit? These amendments are, generally speaking, mere verbiage. It has been said that our Constitution is remarkable for the perspicuity of its language and if so, there was some hazard in attempting to clothe any of its provisions by the (so-called) amendments in different times."

Gouverneur Morris, *Diary and Letters*, II, 529. This comment was written in 1811.

their colleagues, as much as does the original instrument itself.<sup>1</sup> More than sixty years passed before the Constitution was again amended.

#### <sup>1</sup> THE REJECTED AMENDMENT OF 1810.

On the 18th of January, 1810, Philip Reed, of Maryland, introduced a joint resolution, in the Senate that "If any citizen of the United States shall accept of any title of nobility from any King, Prince, or foreign State, such citizens shall thenceforth be incapable of holding any office of honor or profit under the United States."<sup>1</sup>

The charter to Lord Baltimore, granted in 1632, empowered him to confer titles of nobility, but none in use in England, and the Fundamental Constitutions of Carolina allowed its proprietors to issue patents for titles which were supposed to avoid a too numerous democracy and found hereditary privileges peculiarly adapted to America. Under these charters, commissions were granted and a few remain among the heirlooms of North Carolina and Maryland families. But when the chief doctrine of the Revolution—the equality of man—was enthroned, the States took care to forbid their legislatures to grant titles of nobility. Only one State went further than to forbid the grant: Georgia, by its constitution of 1777—in force twelve years—excluded from office and from the right to vote, any person who claimed or held any title of nobility.<sup>2</sup> The Federal Convention seems to have been keenly alive to the importance of forbidding titles, for it forbade the States and the United States to grant them, and forbade persons in the service of the United States to receive them without the consent of Congress.<sup>3</sup> The ratifying conventions of the States did not wholly omit the subject: New Hampshire and Massachusetts demanding that Congress should never consent to the acceptance of a title by any person in the service of the United States,<sup>4</sup> and Virginia and North Carolina demanding a provision declaring against hereditary privileges.<sup>4</sup> Reed's resolution had, therefore, but one precedent,—the clause in the short-lived constitution of Georgia of 1777.

On the 24th of January, his resolution was referred to a select committee of three, himself, Leib, of Pennsylvania, and William

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<sup>1</sup> Annals, 530, (Eleventh Congress, Part I.)

<sup>2</sup> Art. XI.

<sup>3</sup> U. S. Constitution, I, 9, 8; X, 1. See Elliot, V, 130, 131, 381, 561.

<sup>4</sup> See note on Precedents, *infra*.

H. Crawford, of Georgia. Five days later, Reed reported the resolution, as amended, which carried the exclusion from voting and from office to all who accepted a title, or who held one by descent or who intermarried "with any descendant of any emperor, king, or prince, or with any person of the blood royal." On the 15th of February, he reported a further amendment by which all titled persons, as his previous resolution described them, were also excluded from voting or holding office under the United States, "or either of them." On the 20th, a new select committee, on the subject was named, with Crawford as chairman, and Giles, of Virginia, Reed, Pickering, of Massachusetts, and Bayard, of Delaware. Crawford reported a slight amendment on March thirtieth, the resolution, in its modified form being debated, and considered again on the 26th of April, when by a vote of twenty-six to one, the resolution passed in the following form:

"If any citizen of the United States shall accept, claim, receive or retain, any title of nobility, or honor, or shall, without the consent of Congress, accept and retain any present, pension, office, or emolument of any kind whatever, from any Emperor, King; Prince, or foreign Power, such person shall cease to be a citizen of the United States, and shall be incapable of holding any office of trust or profit under them, or either of them."<sup>5</sup> Among those who voted for the resolution were Crawford and Henry Clay, and Nicholas Gilman, of New Hampshire, the only member of the Eleventh Congress who was a member of the Federal Convention. On the 27th the joint resolution was reported in the House,<sup>6</sup> was read twice on the next day and referred to the committee of the whole, and on the first of May, the last day of the session, was passed by a vote of eighty-seven to three.<sup>7</sup> The heavy vote in its favor in both Houses would lead one to expect a long and animated debate on the resolution. On the contrary, not one word of the discussion is reported. The amendment was ratified by eleven States; was rejected by three, and was not acted upon by three.<sup>8</sup>

<sup>5</sup> Annals, 675.

<sup>6</sup> Annals, 1997. (Eleventh Congress, Part II.)

<sup>7</sup> Annals, 2050.

<sup>8</sup> Ratified by Md., Ky., Ohio, Del., Pa., N. J., Vt., Tenn., Ga., N. C., N. H.

Rejected by N. Y., R. I., Conn.

Not acted on by S. C., Va., Mass.

See Documentary History of the Constitution, III, 452-515, for the official acts of the States.

The provisions on the subject prior to the proposed amendment were:

**State Constitutions:**

1776, Maryland, XL; North Carolina, XXII; Pennsylvania, V; Virginia, I, 4.

1777, Vermont, I, VI; Georgia, XI, (the precedent for the amendment.)

1780, Massachusetts, pt. i, VI.

1790, Pennsylvania, IX, 24; South Carolina, IX, 5.

1792, New Hampshire, I, 9, repeated from 1784, I, 9. Delaware, I, 19; Kentucky, XII, 26.

1796, Tennessee, XI, 30.

1799, Kentucky, X, 26.

1802, Ohio, VIII, 24.

**Amendments by Ratifying Conventions:**

1788, New Hampshire, IX, Bulletin of Department of State, No. 5, 243.

North Carolina, IV, Id., 267.

Massachusetts, IX, Journal, 85.

Virginia, IV, Elliot, III, 657.

Between 1789 and 1889, more than seventeen hundred (1740) amendments were proposed to the constitution. See Ames's Proposed Amendments to the Constitution of the United States During the First Century of Its History, a Prize Essay, printed in the Report of the American Historical Association, 1896, Vol. II, (1897.)



## **BOOK IV.**



### **CONTEST AND COMPROMISE.**



**REMARKS:**

THE STATES AND THE UNITED STATES CONTAIN  
SOVEREIGN

[illegible]



executing the authority of Congress. If a loose construction were permitted at the outset, it would prove in the end a more dangerous step, for the Constitution would be ultimately tortured into an interpretation which would transform necessity into mere convenience.<sup>1</sup>

To Hamilton, the question presented a very different aspect; Congress was plainly empowered by the Constitution, he said, to do what was necessary and proper.<sup>2</sup> Not only were its powers expressed but they were implied, and so far as the objects entrusted to its management, they were sovereign. Clearly if these powers were sovereign, Congress had the right to erect corporations. The word, necessary, as descriptive of its powers was not a supreme test of a constitutional right, nor was it to be construed restrictively. Necessity signified expediency. It would be no stretch of the powers of the government to incorporate a bank, because it would be an exercise of the authority within the sphere of specified powers. Congress, moreover, had already exercised the right to erect corporations when it organized the two territorial governments, one northwest, the other southwest of the Ohio.<sup>3</sup> Thus, Hamilton's advice rested on the sovereign power of the federal government to erect corporations, and, therefore, to charter a national bank. His opinion prevailed and Washington signed the bill.<sup>4</sup> It will be remembered that Madison held in the *Federalist*, that the Congress of the Confederation had no authority to establish a government for the Northwest Territory, referring to the ordinance of 1787.<sup>5</sup>

<sup>1</sup> Jefferson's Works, VII, 555.

<sup>2</sup> Hamilton's Works, IV, 105, 119.

<sup>3</sup> Northwest, August 7, 1789; Statutes at Large, I, 50; Southwest, May 26, 1790; Id., 123.

<sup>4</sup> February 25, 1791; Id., 191.

<sup>5</sup> See ante, p. 4.

The financial institution thus authorized had a capital of ten millions of dollars, of which one-fifth was subscribed by the United States. Its charter ran for twenty years, and its bills were a legal tender for all debts to the United States. It established branch banks in the principal cities of the country and throughout its career enjoyed great prosperity and facilitated business of every kind. Twenty-eight years passed before the question of its constitutionality reached the Supreme Court. Chief-Justice Marshall then sustained the law creating it,<sup>1</sup> and shortly afterward, in another case, held that the United States could protect the bank against a State.<sup>2</sup> Hamilton's opinion, which had prevailed with Washington, ultimately prevailed with Jefferson, who, when President in 1804, signed the bill,<sup>3</sup> which Congress had passed with a division, allowing the bank to establish branches in the territories.

Four years after the creation of the bank, a constitutional issue was raised by the Jay treaty.<sup>4</sup> The treaty of 1783, which recognized the independence of the United States, left many matters unsettled, of which the principal were the removal of British troops from the northwest and the settlement of the boundary; the compensation for negroes taken by the British during the Revolution; the payment of claims to Americans for property seized by the British, and the right of the American people to trade with neutral powers undisturbed by England. To settle all these questions, if possible, Washington had dispatched the Chief-Justice, John Jay, as a special envoy

<sup>1</sup> *McCullough vs. Maryland*, (1819) 4 *Wheaton*, 316; *Story's Commentaries*, 1262.

<sup>2</sup> *Osborn et al. vs. The Bank of the Northwest*, (1824) 9 *Wheaton*, 738.

<sup>3</sup> March 23, 1804; *Statutes at Large*, II, 274.

<sup>4</sup> *Treaties and Conventions*, 379, 395.

to England, and he had been successful in negotiating a treaty which was duly signed on the nineteenth of November, 1794. The Senate ratified it on the twenty-fourth of June of the following year, but amidst a tempest of hostility to the treaty. It may be said that the treaty was the cause of our first national excitement after the organization of the new government. The public quite lost its head; divided into an English party and a French party, each of which expressed itself in many outrageous ways; the one bitterly toward France; the other, even more bitterly toward England. If noise and tumult had determined the matter, Washington would never have signed the treaty, but he, serene amidst all difficulties, approved it. Thenceforth its execution would depend upon the action of the House in voting the necessary appropriations. The Senate had refused to approve the twelfth article, on neutral trade, and, as thus amended, the treaty was approved by the British government. Meanwhile, from January to May, 1796, it was debated in the House, which, not satisfied with the course matters had taken, called for all the papers in the case in the possession of the President; but Washington declined to deliver them, doubting the authority of the House to call for them, and convinced that their delivery was highly inexpedient at this time. The majority in the House was unfavorable to the treaty and held to the dangerous doctrine that as it could not be carried into effect without adequate appropriations by the House, which of course were within its control; and that body, therefore, had the right to judge of the expediency of the treaty, and thus practically to defeat it at their pleasure. The issue was not so much the right of the House to call for the papers in the case, as its right to refuse the necessary appropriations for carrying a treaty into effect.

Madison was the leader of the opposition, known at the time as the Democratic-Republicans, who insisted on the constitutional right of the House, not only to refuse the appropriations, but also to participate in the treaty-making power. The strictest of strict constructionists could find no word in the Constitution which empowered the House of Representatives thus to participate in the making of a treaty, and, therefore, the Republicans were forced to shift their ground to one of expediency; arguing that because of the exclusive authority given to the House to originate money bills, to regulate trade, and to lay and collect taxes, and as by the Constitution a treaty was a part of the supreme law of the land, it was expedient that the House should participate in the treaty-making power; otherwise a treaty, in which the House had taken no part, might be made which would regulate commerce. This was a very broad construction of the doctrine of expediency, and was hardly to be expected from a follower of Jefferson. The Federalists, for the time becoming strict constructionists, asserted that it was the plain intention of the Constitution to exclude the House from participating in the treaty-making power. The great speech on the subject was by Fisher Ames, whose argument would now be called economic, for he said much concerning the commercial advantages of ratifying the treaty, but very little of the constitutional functions of the House.<sup>1</sup> He reached so high a plane of eloquence that the Republicans somewhat tumultuously adjourned the House lest a vote be taken, but even adjournment could not break the spell of his speech, for on the following day, the thirtieth of April, the House, though only by a majority of three, and, though a day or two before, a very large majority had

<sup>1</sup> April 28, 1796; Johnston's *American Orations*, I, 64.

vociferously opposed the appropriation, voted to carry the treaty into effect and thus settled the question of the functions of the House in the matter of treaties.

The Senate, in the next Congress, the fifth,<sup>1</sup> was Federalist; the House, Democratic-Republican.<sup>2</sup> France was deeply offended at the ratification of Jay's treaty, and her high-tempered government encouraged such aggressions upon our commerce as almost to precipitate war. Rumblings of hostility to the treaty were heard here and there in the United States and there was much loose talk of active sympathy with France until Americans were awakened to the true conditions of affairs by the publication of the XYZ dispatches,<sup>3</sup> reporting the insults which had been heaped upon our special commissioners to France, Pinckney, Gerry and Marshall, whom President Adams had sent in the hope of avoiding war. The XYZ news speedily checked the tide which had been sweeping toward extreme measures on behalf of France, and transformed public sentiment sufficiently to give the control of both Houses of Congress to the Federalists at the next election. Anxious to get to the bottom of the difficulty, the Federalists, and especially the more extreme members of the party, the so-called High-Federalists, determined to prevent a repetition of the recent unhappy experience of the country, which had been too much influenced, they believed, by noisy foreigners, whose ultimate intentions were to identify the American people with an European alliance of some kind. Aliens who had engaged in unlawful enterprises on behalf of the French Republic, and whose language had been a continuous libel of our own

<sup>1</sup> May 15, 1797; March 3, 1799.

<sup>2</sup> The Senate, 21 Federalists, 11 Democrats; the House, 51 Federalists, 54 Democrats.

<sup>3</sup> October and November, 1797.

government, the Federalists determined, should be silenced. As the party controlled both branches of Congress, it could easily carry out its program. A foreigner should thenceforth be required to reside fourteen years, instead of five, in the country, to gain citizenship, and to give five, instead of three, years' notice of his intention to become a citizen.<sup>1</sup> Alien enemies should be refused naturalization, and all resident aliens should be registered and thus be brought within the surveillance of the government. As the executive branch was best fitted to maintain the peace of the State, the President was empowered to expel from the country any alien whom he believed to be dangerous to its peace, or whom he suspected to be engaged in treasonable practices.<sup>2</sup> If a war with a foreign country should break out, the President, at his discretion, might cause the arrest of all citizens of that country and also all resident aliens, for the time being in America, and if necessary, remove them from the United States.

These were the famous alien and sedition acts of 1798, which immediately provoked widespread hostility and the very memory of which is to this day intolerable to thousands of Americans. The Republicans protested against them<sup>3</sup> as violating the right of personal liberty, and therefore, infringing upon the State constitutions. They protested that they interfered with the right of free migration, and thus worked a direct injury to the States. Because they confused executive with judicial functions, they declared that they were plainly unconstitutional. What constitutional right, they asked, had the President

<sup>1</sup> Act of June 19, 1798; Statutes at Large, I, 566; Annals of Congress, 1570.

<sup>2</sup> Acts of June 25 and July 6, 1798; Statutes at Large, I, 570, 577; Annals of Congress, 1566.

<sup>3</sup> Madison's Works, IV, 524; Annals of Congress, 1631, 1733.

to declare, at his discretion, that a resident alien was a public enemy; or by what authority under the Constitution could Congress empower the President to arrest a person, even though an alien, who, he might suspect, was engaged in treasonable undertakings? Were not the odious laws a palpable violation of the rights of freedom of speech and of the press, given to every inhabitant of the country by the State constitutions? Again, the acts violated the *habeas corpus*, a right which these constitutions most zealously guarded. In spite of these serious objections and latent warnings, the Federalists persisted in passing the acts; but before they had been placed on the statute books, State legislatures were arrayed against them, and political parties were strenuously engaged, some in their attack and others in their defense. A political counter-revolution had broken out, the master spirit of which was Jefferson.

The Federalists were determined to build up a strong executive department, too strong, as Jefferson believed, for the other parts of the Constitution. He and his followers on the other hand were equally determined to strengthen the legislative department.<sup>1</sup> Political parties in America were not thoroughly organized until the time of the alien and sedition laws. But from this time there was a National party and a State party known at first, the one as the Federalist, and the other as the Democratic-Republican. The Democrats accused the Federalists of seeking to strengthen the general government at the expense of the States; the Federalists accused the Democrats of seeking to strengthen the State governments at the expense of the United States. We have seen how the

<sup>1</sup> See Jefferson's letter to the Honorable William Wise, February 12, 1798; reprinted in *The American Historical Review*, April, 1898.

decision of the Supreme Court in 1794, in the case of Georgia, had alarmed the then incipient State party, who speedily took up Iredell's dissenting opinion as the true interpretation of the Constitution, and by its activity during the four years following the decision, succeeded in bringing about the adoption of the eleventh amendment.<sup>1</sup> While the Federalists were busily carrying their alien and sedition acts through Congress, Jefferson was sounding the alarm and his supporters throughout the country were forming a campaign for the purpose of compelling their repeal. The State party did not hesitate to pronounce them unconstitutional, and many public meetings, especially in the South, sent resolutions to the legislatures condemning them. The most famous of all the protests against the acts and the principles which they embodied, took the form of resolutions presented by John Breckinridge to the Kentucky legislature on the seventh of November, 1797. Jefferson was their author.<sup>2</sup> The legislature can scarcely be said to have debated them, but rather to have spent a week in eulogizing the doctrines of the State party and attacking those of the Federalists. The resolutions were passed with great satisfaction. A similar set, written at Jefferson's request by Madison, was presented in the Virginia legislature and adopted with similar zeal on the twenty-fourth of December.<sup>3</sup> These were the Kentucky and Virginia resolutions, still famous in our history, and the first great political landmark fixed by the Democratic party. A second act, also written by Jefferson, was adopted by the Kentucky legislature on the twenty-second of November, 1799.<sup>4</sup> The three sets of

<sup>1</sup> See p. 289.

<sup>2</sup> Preston's Documents, 287.

<sup>3</sup> Preston, 284.

<sup>4</sup> Preston, 295.



resolutions, though differing in language and in political doctrine, when taken together composed a political canon of transcendent importance in our constitutional annals. They agreed in declaring that the Constitution was a compact, to which the States are parties, and that the powers of the general government are limited by the plain sense of the Constitution. In case of a deliberate, palpable and dangerous exercise of powers not granted to that government, the States are in duty bound to interpose and arrest the progress of the evil. The federal government was accused of seeking to enlarge its powers by a forced construction of the Constitution for the purpose of consolidating the States into one sovereignty, the effect of which would transform the republic into a monarchy. The Virginia, and the first Kentucky, resolutions went no further, but the second Kentucky set declared the alien and sedition acts unconstitutional because violating the Bills of Rights in the State constitutions. The States, according to the second Kentucky resolutions, had formed the Constitution, were sovereign and independent, and therefore, had the unquestionable right to judge of its infraction, the rightful remedy of which was "a nullification by those sovereignties of all unauthorized acts done under color of that instrument." Thus, according to these resolutions, a State was a sovereign power, but the general government was not. The second Kentucky resolutions plainly upheld the doctrine of the right of a State to nullify a federal law, from which doctrine the right of secession was an inevitable conclusion.

The Kentucky and Virginia resolutions put the idea of State sovereignty before the country in a practicable form. Copies were promptly sent to all the State legislatures, of which seven immediately formulated replies.<sup>1</sup> The

<sup>1</sup> Elliot, IV, 532.

that it should be subject to the same anti-slavery restrictions. To this it was replied that Missouri was under different conditions than the Northwest Territory had been, for, being a part of the Louisiana purchase, its people were under the treaty of 1803, which bound the United States to protect the property of its citizens. Admitting the general truth of this, the restrictionists answered, that while the treaty made provision for the admission of new States it said nothing of their organization, and even if it had made explicit provision on this point, it could not be binding on Congress, for a treaty was made by the Senate and the President, while the admission of new States and their organization were matters determined by Congress. That the treaty was not binding was clear from the organization of the territories of Louisiana and Orleans, and the admission of Louisiana. In the acts relating to these, Congress had imposed conditions, and therefore, fully established a precedent. Moreover, if Congress had power to purchase the Louisiana country, had it not power to regulate its territorial government, and, if it judged best, to provide for the gradual abolition of slavery within it?

This citation of precedents favorable to the constitutional views of the restrictionists strengthened their case, but there was another aspect to the matter, the economic effect of restricting slavery. Would it not depreciate the value of land in the new State and thus do it an irreparable injury from the outset? But the restrictionists quickly retorted that, on the contrary, the price of land, if slavery were abolished, would rise, citing in proof the greater market price of lands in free States compared with that in slave. They argued also that the exceptions in the Constitution in favor of slavery applied only to the original States. New States could be organized with-

out reference to those exceptions. The republican form of government for a State, upon which the Constitution insisted, did not mean a government with slavery. At this point Clay, speaking for the anti-restrictionists, affirmed that the proposed restriction would violate the clause in the Constitution which declares citizens of each State entitled to all the privileges and immunities of citizens of the several States; which led a Free Soil member to ask him, whether slavery could be called a privilege. He said he feared that if the Tallmadge restrictions were adopted, they would prove only the beginning of conditions; but he was assured that the only condition demanded was that the government of the new States should be republican in form. The question, grave as it was, was quite new, for as yet no settled definition had been made of the term, "republican form of government." The restrictionists pressing their advantage, argued that the migration and importation of slaves had been permitted by Congress until 1808, but that time had now passed, and Congress could prohibit both migration and importation, which meant from one State to another as well as from one country to another. The anti-restrictionists made answer, that as the States were equal, sovereign and independent, Congress could not discriminate among them without destroying the Union. Citizens of the older States had the right to determine whether or not they would have slavery; why should not citizens of Missouri have the same privilege? On the sixteenth of February, both the Tallmadge restrictions were adopted, though by a sectional vote.<sup>1</sup>

On the following day, Taylor of New York, an ardent Free-Soiler, moved to incorporate an anti-slavery clause in the bill then pending for a territorial government for

<sup>1</sup> Benton's Debates, VI, 356.

Arkansas.<sup>1</sup> This alarmed the supporters of slavery even more than Tallmadge's restrictions for Missouri. Was slavery to be assaulted both in the States and in the territories? Had Congress any authority to impose conditions upon the citizens of a State or a territory, distasteful to them? Were not the people of a State, or a territory, the proper judges of their own constitutional rights? At this point, McLane of Delaware, generalizing on the interpretation which the American people North and South had long put upon the ordinance of 1787, and recognizing that the region north of the Ohio river was intended to be free soil forever, and that south of the river forever slave soil, proposed that the principle of the ordinance should be applied west of the Mississippi by fixing some line, north of which slavery should be forbidden. Such an arrangement might easily be made it was thought, because the region west of the river was so vast it would afford ample room both for freedom and slavery. Taylor's proposition to exclude slavery west of the Mississippi was lost by one vote, and McLane's proposition to fix a dividing line was carried by a majority of two, but was almost immediately reconsidered. The vote showed that the House was nearly equally divided on the great issue of restriction, and Taylor then proposed the line of 36 deg. 30 min. north latitude. Several other lines were suggested, some of which were far enough south to include Arkansas, but that territory was finally organized without restriction as to slavery. The Missouri bill was now taken up by the Senate, which on the seventeenth of February, struck out the Tallmadge amendments and passed the bill, thus two Missouri bills were pending, both admitting the territory as a State, the House bill forbidding

<sup>1</sup> Id., 357.

resolutions, though differing in language and in political doctrine, when taken together composed a political canon of transcendent importance in our constitutional annals. They agreed in declaring that the Constitution was a compact, to which the States are parties, and that the powers of the general government are limited by the plain sense of the Constitution. In case of a deliberate, palpable and dangerous exercise of powers not granted to that government, the States are in duty bound to interpose and arrest the progress of the evil. The federal government was accused of seeking to enlarge its powers by a forced construction of the Constitution for the purpose of consolidating the States into one sovereignty, the effect of which would transform the republic into a monarchy. The Virginia, and the first Kentucky, resolutions went no further, but the second Kentucky set declared the alien and sedition acts unconstitutional because violating the Bills of Rights in the State constitutions. The States, according to the second Kentucky resolutions, had formed the Constitution, were sovereign and independent, and therefore, had the unquestionable right to judge of its infraction, the rightful remedy of which was "a nullification by those sovereignties of all unauthorized acts done under color of that instrument." Thus, according to these resolutions, a State was a sovereign power, but the general government was not. The second Kentucky resolutions plainly upheld the doctrine of the right of a State to nullify a federal law, from which doctrine the right of secession was an inevitable conclusion.

The Kentucky and Virginia resolutions put the idea of State sovereignty before the country in a practicable form. Copies were promptly sent to all the State legislatures, of which seven immediately formulated replies.<sup>1</sup> The

<sup>1</sup> Elliot, IV, 532.

New England States defended the alien and sedition laws, though Rhode Island did not consider itself authorized to decide on their constitutionality. Delaware pronounced the Virginia resolutions an unjustifiable interference with the powers of the general government, and Vermont and Massachusetts asserted that it was not within the right of any State legislature to usurp the powers of the federal government. Not one State replied in approval of the Kentucky and Virginia resolutions. The replies received were hardly those expected, but the Virginia House of Burgesses referred them all to a special committee, of which Madison was chairman. He undertook, in an elaborate report,<sup>1</sup> to prove that the Virginia resolutions were in harmony with the express provisions of the Constitution. Though not holding the doctrine of nullification, he defined the federal government to be the result of a compact between the States, and argued that its powers were derivative, not original. The idea of national sovereignty, he thought, was disproved by the history of the country. The States were the final arbiter, for they had created the general government as their agent. Madison did not show just at what time a State might pronounce a federal act to be a palpable violation of State rights; he left the matter open. If nullification was to be the final conclusion of the Doctrine of '98, by which name Madison's interpretation has long since been known, he at least left it to be worked out in the practical administration of the government.

There can be little doubt that the majority of the voters at the time of the adoption of the Kentucky and Virginia resolutions supported, whether or not they understood, the doctrine of '98. The jealousy of the States for their sov-

<sup>1</sup> Elliot, IV, 546.

ereignty,<sup>1</sup> of which Randolph had spoken in the Federal Convention, had become a fixed part of the political creed of most of the American people. This is evident in the result of the presidential election in 1800, which put the Democratic party in possession of the executive and legislative branches of the general government and extended the party's authority among the States. The campaign which Jefferson and his friends had begun while the alien and sedition laws were under discussion in Congress had widened into a national movement and had united a majority of the voters in the country into a great political party, which, on the seventeenth of February, 1801, was able, through its representatives in the House, to elect Jefferson, President of the United States. The repeal of the alien and sedition acts soon followed.<sup>2</sup> If the doctrine of these resolutions was true then the court of last resort in all cases in which the constitutionality of an act of Congress was in doubt, was the State legislatures. But the Federalists stoutly held to the contrary, and the Supreme Court being dominated by men of their political faith, they succeeded in sustaining their theory of the function and jurisdiction of the federal judiciary; Chief-Justice Marshall, in no uncertain language laying down the principle of national sovereignty.<sup>3</sup>

An opportunity to apply the doctrine of the Kentucky and Virginia resolutions presented itself soon after the inauguration of Jefferson, in the matter of the constitutionality of the purchase of the Louisiana country. The navigation of the Mississippi had been the subject of diplomacy before the adoption of the Constitution, and

<sup>1</sup> See Vol. I, ante, p. 307.

<sup>2</sup> April 14, 1802.

<sup>3</sup> *United States vs. Peters*, (1809) 5 Cranch, 115; *Gibbons vs. Ogden*, (1824) 9 Wheaton, 1; *Story's Commentaries*, 1637.

as we have seen, the Virginia convention had stood resolutely against ratification till the Kentucky members were convinced that, if the new Constitution was adopted, the general government would not surrender the control of the great river to Spain.<sup>1</sup> The same understanding quieted much opposition in North and South Carolina, which States at that time extended to the Mississippi. The Spanish cession of Louisiana to France by secret treaty, in 1800, increased rather than diminished the danger to American interests, for France was a greater power than Spain and could maintain a more active control of the navigation of the river. Recognizing the public danger, Jefferson, in a private letter<sup>2</sup> recorded his conviction that whatever foreign power possessed New Orleans it must be the natural and habitual enemy of the United States, and he instructed Livingston, our minister to Paris, to enter into negotiations for the acquisition of the island of Orleans and the two Floridas. At this time Napoleon was contemplating the execution of a mighty colonial policy. New France should again take its place on the map of America, and the decision secured half a century before on the Heights of Abraham, should be reversed. In consequence of this imperial dream, Livingston at first received scant attention, but disaster soon overtaking the Emperor compelled him to abandon his colonial scheme, and Livingston was informed that France would sell Louisiana to the United States. Though not an unexpected opportunity, it was one that could never occur again. The transaction was speedily carried through. On the thirtieth of April, 1803, the United States, by a treaty signed at Paris, acquired the entire Louisiana

<sup>1</sup> See pp. 101-104.

<sup>2</sup> April 18, 1802; *Works*, IV, 431.



country for fifteen million dollars.<sup>1</sup> The inhabitants were incorporated into the Union, and were to be admitted to all the rights of citizens of the United States as soon as possible. They were guaranteed the protection of their liberty, property and religion.<sup>2</sup> By a reciprocity clause the port of New Orleans was made free for twelve years to the manufactures and commerce of France, Spain and their colonies, but no other nation was favored in like manner.

The Federalists quickly assailed the constitutionality of the purchase, though they acknowledged its immeasurable importance to the Union. But the most famed man of the party, Hamilton, took a broader view, and though he seldom agreed with Jefferson on constitutional questions, he now supported him, urging, with his customary foresight and precision, that the unity and best interests of the United States demanded the annexation of all the territory west of the Mississippi.<sup>3</sup>

There was no American precedent for the purchase, and Livingston and Monroe, who carried the negotiation through, confessed that they had exceeded their instructions; but they well knew that they were carrying out Jefferson's wishes. The politic, indeed the only thing for the President to do, was to have the treaty approved as speedily as possible and without debate, for there were constitutional difficulties in the way. Jefferson's program was carried out to the letter, its execution being an easy matter with a Republican majority in both Houses. On the nineteenth of October, the Senate ratified the treaty, with ten votes to spare, and the House, with equal

<sup>1</sup> The total cost of the purchase to June 30, 1880, was \$27,267,-621.98; Donaldson's Public Domain, 105.

<sup>2</sup> Article III, Treaties and Conventions, 332.

<sup>3</sup> Hamilton's Works, VI, 541.

promptness and zeal, voted the necessary appropriations to carry it into effect, no member hinting at any right of the House to do otherwise. A territorial government for Louisiana was authorized, but, strange to say, on a monarchical plan. The President was empowered to take possession of the territory and to govern it at his discretion till a government in due form could be established by Congress.<sup>1</sup>

This unique law can hardly be said to have conformed to Jefferson's principle of strict construction, yet he approved it without delay and promptly carried it into effect. But it gave the Federalists an opportunity to turn strict constructionists, to retaliate on Jefferson and to accuse him of holding monarchical views. John Randolph, the ingenious but eccentric Democratic leader in the House, even attempted to prove that the acquisition complied strictly with the Constitution; but even those who inclined to judge him insane most of the time, believed that he knew better. When a strict constructionist so doctrinaire as Randolph could take such a position, it was a sign that political parties were losing the ground under their feet. Men of both parties knew that not one word in the Constitution authorized the purchase, and a few members who had belonged to the Federal Convention knew more than this, namely, that not one word spoken in that Convention had intimated that the Louisiana country would sometime be annexed to the United States. The acquisition was an innovation. Even the so-called sovereign bodies, the States, had not been consulted in the matter. Indeed, for a brief time our statesmen were bewildered over the issues of the acquisition, and the people knowing less about it, could neither pronounce it wise

<sup>1</sup> October 31, 1803; Statutes at Large, II, 245.

nor foolish. It was the first expansion of the Republic, and in directing it Jefferson showed statesmanship of the highest order. He did not suffer the silence of the Constitution respecting the acquisition of territory to prevent securing for the American people a region of country essential to their general welfare. In admitting that the Constitution made no provision for acquiring foreign territory, or incorporating foreign Nations into the Union, and in confessing that he believed that he had done an act beyond the Constitution, Jefferson was an honest man. But he believed that the act was for the good of the country, and for this reason the treaty should be ratified, the purchase money paid, and the Democratic-Republican party, which was responsible for the transaction, should appeal to the country for support. But Jefferson had sufficient respect for the fundamental law to urge an amendment to the Constitution formally ratifying the purchase, and he went so far as to draw one up, with the intention of submitting it to Congress. The great transaction, however, had been completed; the country believed in Jefferson and soon expressed itself in no unmistakable terms in favor of his policy in negotiating the acquisition. The party leaders, perhaps less scrupulous than Jefferson, declared that there was no need of an amendment, which evidently was also the opinion of Congress, for the matter was dropped. The acquisition of the Louisiana country remains unique in our history as an example of the abandonment of party doctrines by a party chief long enough to execute a policy which in principle contradicted his rule of constitutional interpretation.

But Jefferson and his friends were not alone in abandoning party precepts. The Federalists in like manner forgot their principles and attacked the purchase as unconstitutional, but they spoke as men piling up evidence

against themselves. What they lacked in argument they more than supplied in threats; they out-Jeffersoned Jefferson in demanding a constitutional amendment, but insisted that it should be adopted prior to the treaty. Even Nicholson of Maryland failed to satisfy them in his argument that a sovereign Nation always possesses a right to acquire new territory, though he cited in proof the provision in the Constitution which empowers Congress to dispose of and to make all needful rules and regulations respecting the territorial or other property of the United States. But this was a borrowed plume, a Federalist argument, and interpreted the Constitution along lines which the Democratic-Republicans long had somewhat noisily held to be highly dangerous.

Another objection of more serious nature was made by Pickering of Massachusetts, the late Secretary of State under Adams, who declared in the Senate that such a transaction as the purchase of Louisiana, which so seriously affected the Union, could not be made without the assent of each State, a remarkable utterance for a High-Federalist. "In like manner," said he, "as in a commercial house, the consent of each member would be necessary to admit a new partner into the company."<sup>1</sup> But this partnership theory of the government was new, at least as a Federalist doctrine, though old enough in the mouths of the Republicans, who had made effective use of it when exploiting the Kentucky and Virginia resolutions, though they saw nothing in it now. Some of them blandly asked the Federalists, how this partnership theory could be harmonized with their favorite theory that the general government was national, not federal in character. All in all the debate was curious. Federalists turned Republicans, Republicans turned Federalists, at

<sup>1</sup> Benton's Debates of Congress, III, 13.

least for a time, and the transformation, in both cases, was merely to further party interests.

Hamilton was sharply criticised for supporting Jefferson, but he was not the only broad constructionist who stood with the President; John Quincy Adams sustained Jefferson and was promptly read out of the Federalist party. He agreed with Hamilton that the purchase was the right thing, but he differed with him as to the best means of removing the difficulties left over. He favored ratification of the purchase by the State legislatures as equivalent to a constitutional amendment, but this advice so plainly squinted between the old time national doctrine of the Federalists and the Republican doctrine of '98, that Adams found friends in neither party. Henceforth to the end of his life he continued to be the most active and able Independent in public life. Many Federalists, though not the great leaders, suddenly professed their belief in the doctrine of '98, and urged its radical application. Let the States pass on the question of the purchase, but rather than an approval of the treaty let them secede from the Union.<sup>1</sup> But this program was too heavy, as only three States had Federalist legislatures at this time. Hamilton, who saw both the danger and the absurdity of this advice, opposed it. The correspondence of some of the Federal leaders with Aaron Burr at this time, the ultimate purpose of which is not exactly known, has been supposed by many to point clearly to secession. The disaffected Federalists persisted in saying that the Louisiana purchase would injure the North and East beyond remedy. But the element of danger latent in the acquisition seems to have been wholly missed, for not one Federalist is on record as having anticipated the extension of slave territory which the purchase made possible,

<sup>1</sup> Jefferson's Works, IV, 542.

nor of foreseeing the effect which it was to have upon the history of the slave power.

Neither did the Republicans in defending the treaty hint at slavery extension; that issue was reserved for a later day. The bitter controversy over the treaty shows how political parties are dominated at critical times by expediency. The irony of history did not cease with the mere exchange of party position. Twenty-five years after the purchase, Chief-Justice Marshall, the greatest of our judges and one of the most uncompromising Federalists of his time, in an official opinion, fully sustained the constitutionality of the purchase. The Constitution, said he, confers absolutely on the government of the Union the powers of making war and of making treaties; consequently that government possesses the power of acquiring territory either by conquest or by treaty.<sup>1</sup> Marshall was Chief-Justice at the time Louisiana was acquired. It is believed that he held the opinion then which he afterward expressed in his decision. That a few radical Federalists, chiefly in New England, advocated secession rather than acquiescence in the treaty is beyond doubt, but whether action would have followed speech is doubtful. It is an interesting question whether Marshall would have given a decision sustaining the constitutionality of the acquisition had the case involving this issue come before him in 1803. We believe that he would have sustained the purchase as constitutional. It may be asserted, boldly, that he would not have sustained an act of secession.<sup>2</sup> The purchase of the Louisiana country under Jefferson became the precedent for all our later acquisitions, and the prin-

<sup>1</sup> *The American Insurance Co., et al, vs. Canter*, 1 Peters, 511, (1828).

<sup>2</sup> Compare *Cohens vs. Virginia*, 6 Wheaton, 377; *Ogden vs. Sanders*, 12 Wheaton, 332.

ciple laid down by the Chief-Justice forever settled the question of their constitutionality.

Four years after the Louisiana purchase, one aspect of the issue of secession came up in connection with the embargo of 1807,<sup>1</sup> which bore heavily on the commerce and manufactures of the whole country, but most heavily on New England, where it provoked serious opposition. Its defenders argued that it had been made in the exercise of the war power, under the authority of Congress to regulate commerce; but this did not convince the majority of the people of New England of the constitutionality of the law.<sup>2</sup> Of the sentiment of New England toward the act Webster has not left us in doubt. Instead of regulating commerce, it stopped it indefinitely, for the law was perpetual; therefore, New England considered it a violation of the Constitution. Here, said Webster, was a fine opportunity for the New England States, and especially Massachusetts, to declare, according to the doctrine of '98, that the embargo law was a deliberate, palpable and dangerous exercise of power not granted by the Constitution. It was deliberate, because long continued; palpable, because no words in the Constitution, but only a violent construction of it suffered the law; and it was dangerous, since it threatened utterly to ruin the most important interest of the States. It beggared thousands of families; but the State went no further than to petition Congress for its repeal and with some effect.<sup>3</sup> Though a majority of the New England people believed that the law was unconstitutional, they were willing that the decision should be made by the proper tribunal. It was made and it was made against them. The constitu-

<sup>1</sup> Act of December 22, 1807; Statutes at Large, II, 451.

<sup>2</sup> Life of William Plummer, 369; Gould's Portland, 423.

<sup>3</sup> Benton's Debates, III, 629; Webster's speech.

tionality of the law was sustained.<sup>1</sup> New England submitted and refused to apply the doctrine of '98.<sup>2</sup>

The hostility of New England toward the embargo culminated at last in a fixed sentiment toward the whole Republican administration and found vent in 1814, in the Hartford Convention and in opposition to the second war with England. This Convention was nothing more than an assembly of ardent but somewhat over-alarmed Federalists, eager to protest against a political policy. But the Republicans, who were possessed of a long memory, construed it as preliminary to an overt act of secession; the natural result of the threats of some extreme Federalists in 1803. The Hartford Convention has long and unjustly been pilloried before the world as a witness to the once treasonable intentions of New England.<sup>3</sup> The East had little reason for being enthusiastic in support of the war of 1812, which for a time ruined the commerce of the country. The Federalists, who as yet were the strongest party in New England, asserted that a conflict might have been avoided. In some quarters the sluggish indifference to the call of the government for support, led to a denial of the constitutional authority of the President to call out the militia. In the State of New York a militiaman refused to enter the service of the United States in obedience to the summons of the President. Though this case did not reach the Supreme Court till after the war, it finally led to a decision of the principal at issue.<sup>4</sup> The Court held that with the President

<sup>1</sup> Blake's Examination of the Constitutionality of the Embargo Laws, United States District Court, Salem, Massachusetts.

<sup>2</sup> Webster's Second Speech on Foot's Resolution; Works, III, 327.

<sup>3</sup> See Dwight's Hartford Convention and its Journal.

<sup>4</sup> Martin vs. Mott, 12 Wheaton, 19 (1827); the decision by Mr. Justice Story.



was not common to all the States, would produce, he believed, most pernicious consequences. Thus the answer of the Republicans to the great demand heard loudly in the West, for internal improvement at national expense in 1818, was *non possumus*. In this opinion Monroe only followed Madison, who had taken exactly the same ground in an earlier veto.<sup>1</sup> But these opinions were not shared by the whole country as the resolutions of the House of Representatives adopted a year after Madison's veto indicated.<sup>2</sup> These asserted the right of Congress to make appropriations for such improvements, but as yet they had not the support of the majority of the people, and therefore, were only the opinion of the minority party, but it was a minority which was soon to be heard from.

Slavery flourished in the Louisiana country before its acquisition by the United States, and the treaty of 1803 bound our government to protect its inhabitants in the enjoyment of their religion, liberty and property. As we have seen, no objection was made to the acquisition, even by the Federalists, because of the existence of slavery within it, nor was any objection made to the admission of Louisiana as a State in 1812, on account of slavery,<sup>3</sup> though the number of slaves had then greatly increased. There were at that time about one hundred thousand people in the entire Louisiana country, of whom about twenty thousand were scattered within the bounds of the present State of Missouri. The tide of immigration was then turning toward the southwest, and in ten years the population of what we now call Missouri had increased to nearly seventy thousand, of whom one-seventh were slaves. There were at this time, 1819-1820, about sixteen

<sup>1</sup> March 3, 1817, Richardson, I, 585.

<sup>2</sup> March 4, 1818.

<sup>3</sup> April 8, 1812.

hundred slaves in Arkansas. The treaty of 1803 also provided for the organization of new States out of the purchase and their ultimate admission into the Union on equal footing with the original thirteen. By the treaty, therefore, the United States assumed two obligations; first, to protect slavery, because slaves were property; and secondly, to admit new States from the region without discrimination.

Soon after the admission of Louisiana, the region lying to the north was organized as a territory under the name of Missouri,<sup>1</sup> but nothing was said at the time concerning slavery in the territory; the act differing from former organizing acts chiefly in providing for the biennial election of members of the Lower House, who, as it was the custom in the earlier territorial acts, were required to be freeholders. The laws of Louisiana were extended over Missouri territory, and as Louisiana was a slave State, the future of the territory seemed determined. The rapid influx of immigrants, especially from the older slave-holding States, soon awakened a desire for admission into the Union, which culminated in a formal petition for admission, presented by Scott, the delegate from the territory, to Congress in March, 1818. The matter rested until December, when Henry Clay, the Speaker, resubmitted the Missouri petition for admission, but it was not acted upon until the thirteenth of February, at which time the report of the Committee of the Whole, favorable to admission, was discussed. It was in the usual form, that the Constitution of the new State must be Republican in form and consistent with the Constitution of the United States. The greater part of Missouri lay north of the line of 36 deg. 30 min., and west of the region which by the ordinance of 1787, had forever been set apart

<sup>1</sup> June 4, 1812.

as free soil. The principle of the compromise embodied in the ordinance was doubtless at this time in the mind of many members of Congress, who wished the new State to be free soil, and would extend the anti-slavery clause of the ordinance over it. The sudden appearance of a Free-Soil party at the time of the committee's report favoring the admission of Missouri, appears upon closer examination to have been the result of many causes of long standing, rather than a sudden inspiration. The conditions which the Committee of the Whole imposed, that the Constitution of new States should be republican in form, gave opportunity to test what that form was understood to be.

Two days after the committee's report, Tallmadge, of New York, precipitated one of the most critical debates in our constitutional history by proposing two restrictions on the new State; the exclusion of slavery, except as punishment for crime, and the gradual emancipation of all children born slaves within the State, at the age of twenty-five years.<sup>1</sup> The effect of these two restrictions would ultimately transform Missouri into free soil. The ordinance of 1787 undoubtedly suggested the first restriction, and the gradual emancipation acts of several Northern States, the second. The restrictionists urged the expediency of the two provisions, but the anti-restrictionists, with equal zeal, replied that Congress had no authority to impose any conditions other than that the new State be republican in form. But the restrictionists cited the authority of Congress to dispose of and make all needful rules and regulations respecting territorial and other property of the United States, and referred to the enabling acts of Ohio, Indiana and Illinois, each of which forbade slavery. As Missouri lay west of these States, the restrictionists argued

<sup>1</sup> February 15, 1819; Benton's Debates, VI, 334.

that it should be subject to the same anti-slavery restrictions. To this it was replied that Missouri was under different conditions than the Northwest Territory had been, for, being a part of the Louisiana purchase, its people were under the treaty of 1803, which bound the United States to protect the property of its citizens. Admitting the general truth of this, the restrictionists answered, that while the treaty made provision for the admission of new States it said nothing of their organization, and even if it had made explicit provision on this point, it could not be binding on Congress, for a treaty was made by the Senate and the President, while the admission of new States and their organization were matters determined by Congress. That the treaty was not binding was clear from the organization of the territories of Louisiana and Orleans, and the admission of Louisiana. In the acts relating to these, Congress had imposed conditions, and therefore, fully established a precedent. Moreover, if Congress had power to purchase the Louisiana country, had it not power to regulate its territorial government, and, if it judged best, to provide for the gradual abolition of slavery within it?

This citation of precedents favorable to the constitutional views of the restrictionists strengthened their case, but there was another aspect to the matter, the economic effect of restricting slavery. Would it not depreciate the value of land in the new State and thus do it an irreparable injury from the outset? But the restrictionists quickly retorted that, on the contrary, the price of land, if slavery were abolished, would rise, citing in proof the greater market price of lands in free States compared with that in slave. They argued also that the exceptions in the Constitution in favor of slavery applied only to the original States. New States could be organized with-

out reference to those exceptions. The republican form of government for a State, upon which the Constitution insisted, did not mean a government with slavery. At this point Clay, speaking for the anti-restrictionists, affirmed that the proposed restriction would violate the clause in the Constitution which declares citizens of each State entitled to all the privileges and immunities of citizens of the several States; which led a Free Soil member to ask him, whether slavery could be called a privilege. He said he feared that if the Tallmadge restrictions were adopted, they would prove only the beginning of conditions; but he was assured that the only condition demanded was that the government of the new States should be republican in form. The question, grave as it was, was quite new, for as yet no settled definition had been made of the term, "republican form of government." The restrictionists pressing their advantage, argued that the migration and importation of slaves had been permitted by Congress until 1808, but that time had now passed, and Congress could prohibit both migration and importation, which meant from one State to another as well as from one country to another. The anti-restrictionists made answer, that as the States were equal, sovereign and independent, Congress could not discriminate among them without destroying the Union. Citizens of the older States had the right to determine whether or not they would have slavery; why should not citizens of Missouri have the same privilege? On the sixteenth of February, both the Tallmadge restrictions were adopted, though by a sectional vote.<sup>1</sup>

On the following day, Taylor of New York, an ardent Free-Soiler, moved to incorporate an anti-slavery clause in the bill then pending for a territorial government for

<sup>1</sup> Benton's Debates, VI, 356.

Arkansas.<sup>1</sup> This alarmed the supporters of slavery even more than Tallmadge's restrictions for Missouri. Was slavery to be assaulted both in the States and in the territories? Had Congress any authority to impose conditions upon the citizens of a State or a territory, distasteful to them? Were not the people of a State, or a territory, the proper judges of their own constitutional rights? At this point, McLane of Delaware, generalizing on the interpretation which the American people North and South had long put upon the ordinance of 1787, and recognizing that the region north of the Ohio river was intended to be free soil forever, and that south of the river forever slave soil, proposed that the principle of the ordinance should be applied west of the Mississippi by fixing some line, north of which slavery should be forbidden. Such an arrangement might easily be made it was thought, because the region west of the river was so vast it would afford ample room both for freedom and slavery. Taylor's proposition to exclude slavery west of the Mississippi was lost by one vote, and McLane's proposition to fix a dividing line was carried by a majority of two, but was almost immediately reconsidered. The vote showed that the House was nearly equally divided on the great issue of restriction, and Taylor then proposed the line of 36 deg. 30 min. north latitude. Several other lines were suggested, some of which were far enough south to include Arkansas, but that territory was finally organized without restriction as to slavery. The Missouri bill was now taken up by the Senate, which on the seventeenth of February, struck out the Tallmadge amendments and passed the bill, thus two Missouri bills were pending, both admitting the territory as a State, the House bill forbidding

<sup>1</sup> Id., 357.

slavery, the Senate bill permitting it. Neither the House nor the Senate would recede from its position, and without any serious attempt at a conference Congress adjourned.<sup>1</sup>

When it re-assembled, in December, the Missouri question had become a great national issue, the first of a sectional character in our history. Scott, the Missouri delegate, again presented a petition for its admission, and Strong, a member from New York, gave notice of his intention at an early day to introduce a bill forbidding slavery within the territories of the United States. The people of the District of Maine had for several years been contemplating separation from Massachusetts and organizing as an independent State. The Massachusetts legislature at last gave its consent, a convention assembled at Portland and framed a constitution which was ratified by the people of the District.<sup>2</sup> A bill for the admission of Maine passed the House on the third of January;<sup>3</sup> a similar bill was pending in the Senate. While the House bill was under way, Clay, in ambiguous but suggestive words, intimated that if hard conditions were imposed on new States in the West, equally hard ones might be imposed on new ones in the East. Whatever he meant by this, and doubtless his purpose was to throw out a hint of compromise, when the House bill was brought up in the Senate, on the sixth of January, it was speedily proposed that a clause for the admission of Missouri should be attached as a rider to the Maine bill. There was no natural relation between the two matters. Roberts of Pennsylvania, sought in vain to keep the propositions

<sup>1</sup> *Annals of Congress*, 1572; March 3, 1819.

<sup>2</sup> *The Articles of Separation, the Proclamation of the Governor of Maine and other documents are given in the Maine Constitutional Convention, 1819-20; Charles E. Nash, editor; Augusta, 1894.*

<sup>3</sup> 1820.

separate, and also to exclude slavery from Missouri. But the restrictionists were powerless in the Senate, though all powerful in the House. No new arguments were added in the Upper Branch, but old ones were added from the fathers, and particularly from the Federalist, which was made to do duty on both sides of the question. It was apparent that the deadlock between the two Houses was not likely to be broken unless by a compromise of some sort, and this was speedily forthcoming.

On the eighteenth, Senator Thomas, of Illinois, introduced a bill forbidding slavery north and west of the proposed State of Missouri, this was the opening wedge. Meanwhile the legislatures and many public meetings over the Union had taken up the issue and had sent resolutions to Congress, some favoring, others opposing the further extension of slavery. Delaware alone of the slave States opposed further slavery extension. By a majority of two votes, the Senate, on the sixteenth, united the Maine and Missouri bills,<sup>1</sup> and Senator Thomas offered the specific compromise, that except within the limits of the State of Missouri, slavery should be prohibited in all western territories north of 36 deg. 30 min.<sup>2</sup> One of the Southern members, Barbour, of Virginia, tried to lower the line to 40 deg., but the Thomas line practically extended the old line of the Ohio river and afforded good ground for a working compromise. The analogy of the ordinance of 1787, was preserved by the addition of a fugitive slave clause, which Thomas proposed on the seventeenth, and thus amended the compromise passed the Senate by a vote of thirty-four to ten. Eaton of Tennessee, attempted to limit the effect of the bill, that it should apply only so long as the West should remain a territory,

<sup>1</sup> Benton, VI, 450.

<sup>2</sup> February 17, 1820, *Id.*, 451.



but Trimble, of Ohio, wished to enlarge its effect by applying it to all territory west of the river, except Missouri, but both propositions failed.

The Maine-Missouri bill went to the House on the eighteenth, and there fell into the hands of a hostile party. First, the House rejected the Missouri rider to the Maine bill, and also the Thomas amendment, and proceeded to discuss its own original bill containing the Taylor restrictions. The discussion clearly showed that whatever bill the House passed was sure to contain a restrictive clause of some kind. The Senate gave notice that it would insist upon its own amendments, and the House by a vote of ninety-seven to seventy-six refused to agree to the Senate bill. The friends of Missouri, of whom none were more zealous than Lowndes of South Carolina, were willing to vote the compromise principle, if Missouri could be admitted as a slave State. When the Senate learned that the House insisted on its own bill, Thomas moved for a committee of conference. The motion prevailed, and the House, on the following day, also agreed to confer. But this amicable move did not change the course of affairs in the House, which, on the first of March, passed its own Missouri bill with the Taylor restrictions, and sent it to the Senate.<sup>1</sup> On the following day, the Senate substituted the Thomas compromise for the Taylor restrictions, and returned the bill to the House. The two bills were then sent to the committee of conference which soon reported that the Senate should abandon its attempt to unite Maine and Missouri in one bill, and Maine should be admitted; the House should abandon slavery restrictions within the State of Missouri, but the Thomas amendment should be accepted and slavery be forbidden north and west of that State. But before the House concurred the

<sup>1</sup> Annals, 1572.

grave character of the pending issue was again portrayed in no uncertain language. The fate of the Union was in the balance. Men might smile at the idea of disunion but unless the radical restrictionists of the North, said Kinsey of New Jersey, were willing to accept the olive branch offered by the South, and suffer an equal division of the vast and fertile West, disunion must follow. But the House was loath to abandon restrictions for compromise, and the report of the conference committee was carried only by a majority of three.<sup>1</sup> The report was accepted on the second of March;<sup>2</sup> Maine was admitted, and on the fifteenth, the people of Missouri were authorized to form a constitution.

The Missouri convention met on the twelfth of June, at St. Louis, and in seven weeks framed a constitution, one clause of which, suggested by Thomas H. Benton, renewed and embittered the Missouri controversy. The general assembly was instructed to pass as soon as possible such laws as might be necessary to prevent free negroes and mulattoes from coming into the State or settling in it under any pretext.<sup>3</sup> The constitution was sent to Congress and was referred to a select committee of the House, which reported on the twenty-third of November. The Benton provision was the chief theme. Was it repugnant to the Constitution of the United States? Did it apply to citizens of the United States? But as a similar clause was found in the laws of five States, was it without precedent? The constitutions and laws of all the States discriminated more or less between white and black men in all the relations of life. If too broad a construction were

<sup>1</sup> Ninety to 87.

<sup>2</sup> Benton, VI, 471.

<sup>3</sup> Missouri Constitution, 1820, Article III, Section 26; Benton's Thirty Years' View, I, 8.

to be put upon the provision affecting the privileges and immunities of citizens of the several States, their powers of self defense would be broken down, and a consolidated government would be the result. As soon as the people formed a State government, they became sovereign and independent, and it was the province of the courts, not of Congress to determine the constitutionality of laws. This was the substance of the committee's report, which concluded with a recommendation in favor of admitting the new State.

But the Missouri constitution raised a new question. The old issue had involved the power of Congress to impose conditions on a territory; the new question was whether Congress could impose conditions upon a State? If the Benton provision conflicted with the national Constitution, that fact should be left to be determined by the Supreme Court. The provision excluded free persons of color, even if citizens, to enter the State, but such persons were excluded by State constitutions already in force. Why discriminate against Missouri, it had organized a State government<sup>1</sup> under an act of Congress and was already a sovereign State. To all this it was replied that Missouri was not yet a State, for though she had chosen Senators and Representatives, they had not yet been admitted to seats in Congress, nor had the Missouri constitution been approved. Whether or not it was repugnant to that of the United States was for Congress alone to determine. Free persons of color were citizens in seven States<sup>2</sup> of the Union, and the constitutions of these did not prohibit such persons from voting. The right of citizenship

<sup>1</sup> XIX, Niles Register, 51.

<sup>2</sup> New Hampshire, Vermont, Massachusetts, New York, Pennsylvania, North Carolina and Tennessee.

did not give the right to vote; but the right of free locomotion was indispensable to citizenship.

The Missouri constitution raised a question in Congress which had never before come up, the status of free persons of color. There were more than three hundred thousand such persons in the country in 1820, of whom about sixty thousand were males of voting age.<sup>1</sup> At this time the extension of the right to vote to such persons was agitated as a reform in the State of New York, and the right was embodied in the constitution of that State of 1821. The laws of New York at the time of the Missouri controversy permitted free persons of color, duly qualified to vote. Such persons voted in Tennessee,<sup>2</sup> and had been known to vote in North Carolina,<sup>3</sup> in which State the letter of the constitution empowered them to vote, and they had long been accustomed to vote in Massachusetts, New Hampshire and Vermont, but public sentiment in Tennessee and North Carolina was hostile to negro suffrage and practically abrogated the right; and public sentiment in the New England States cannot be said either to have encouraged this class to emigrate or to vote. In all these States public sentiment was the higher law, whether or not it conformed to the law of the constitution, and the animus of this higher law now pervaded the debate in Congress over the Missouri constitution. The debate suddenly started up after a motion made by Cobb, of Georgia, on the twelfth of January, 1821, for the correction of the journal, that it read "the State of Missouri." That title having been used in three memori-

<sup>1</sup> For a particular account of the laws affecting them, and of their condition, see my *Constitutional History of the American People, 1776-1850*, Vol. I, Chap. XII.

<sup>2</sup> Caldwell's *Constitutional History of Tennessee*.

<sup>3</sup> *Proceedings and debates of the North Carolina Convention, June 4 to July 11, 1835; 355 and passim.*

als on the public lands from the Missouri legislature, which had been presented to the House on the preceding day. The vote on Cobb's motion was a tie, the effect of which was rather anomalous; if the House refused to recognize Missouri as a State, it must be a territory. But straightway, by a vote of one hundred and fifty to four, the House refused to designate Missouri on the journal as a territory and here the matter stood for awhile.

In the Senate meanwhile, the committee to whom the Missouri constitution had been referred had reported a resolution<sup>1</sup> declaring the State admitted. But the Benton provision became a subject of contention here as in the House. Eaton of Tennessee sought to avoid difficulty by offering a resolution, which, while recognizing the act of admission, declared that this act should not be construed as giving the assent of Congress to any provision in the Missouri constitution which might be contrary to the Constitution of the United States. But his resolution was rejected for the time. Every Senator knew that throughout the Union at this time there was an accepted discrimination against the African whether bound or free. Morrill, of New Hampshire, proved from the records of his own State and those of Vermont and Massachusetts, that free men of color had long been accustomed to exercise the privileges and enjoy the immunities of citizens, evidence which he thought was sufficient to warrant a rejection of the Missouri constitution. Eaton's amendment was then reconsidered and carried as being nothing more than a declaration of the attitude of Congress to the whole question.

On the twenty-ninth of January,<sup>2</sup> the House took up the Senate resolution admitting Missouri. Clay spoke in

<sup>1</sup> November 29, 1820.

<sup>2</sup> 1821.

favor of it and Lowndes, Randolph, Barbour and most of the members from the slave States, declared against it. So conflicting and various were the opinions that the House could agree on nothing, and it failed to adopt either the Senate resolution or one of its own. Now it was that Clay came forward with another compromise. The Senate resolution should be referred to a Special Committee of Thirteen, but should be amended so that Missouri should be admitted upon condition that its legislature would never pass a law preventing any description of persons from going into the State and settling there, who were or who might become citizens of any State in the Union. The Missouri legislature should be given until the fourth of November to comply with the condition. If, by that time, it had conformed it should communicate its solemn public act to the President, who should then proclaim the compliance, and Missouri should be admitted without further action of Congress. On the twelfth the House took up the report of Clay's committee, but the momentum of opposition was so strong that at first both Clay's amendment and the Senate resolution were rejected, but on the following day its action was reconsidered and the debate was resumed. At this time General Charles Pinckney, of South Carolina, who had been a member of the convention that framed the Constitution, was a member of the House. He declared in a speech of some historical interest, that he was the author of the clause of the Constitution relating to the privileges and immunities of the citizens of the several States, and that at the time he drew it, he knew perfectly that there was no such thing in the Union as a black or colored citizen, and that notwithstanding all that had been said on the subject, he did not believe that such a person existed in 1821. He then attempted to show that free persons of color had

never been citizens of the United States or possessed the rights of white men, and that they were incapable of exercising them. Though there is no evidence that General Pinckney was the author of the clause in question,<sup>1</sup> and though his argument against the citizenship of free persons of color whether in 1789 or in 1821 has any historical basis, yet his statements carried great weight in the House, for he seemed to speak as one having authority.

The time for counting the electoral vote was now at hand, and it was feared that there might be tumult in case the friends of Missouri insisted that its vote should be counted. When the day arrived and the vote of Missouri was announced,<sup>2</sup> the two Houses being assembled as usual in the Representative Chamber, Livermore, a New Hampshire member, amidst confusion, objected to counting the vote of Missouri, because it was not yet a State; this precipitated a tumult. The Senate withdrew amidst confusion and the House fell to wrangling over the matter. Floyd, of Virginia, submitted a resolution that the vote should be counted. This revived the whole question and was likely to lead to no immediate settlement of it. Clay succeeded in carrying through a pacific motion to lay Floyd's resolution on the table and proceed with the count. Happily this was agreed to and word was sent to the Senate that the House was prepared to receive it for the purpose of counting the vote. The matter was finally settled by a joint resolution, that if the vote of Missouri was counted the result would be two hundred and thirty-one votes for Monroe for President and two hundred and eighteen for Tompkins for Vice-President; if it was not counted it would receive three less. Thus happily in either case

<sup>1</sup> See Madison's testimony on this point, Elliot, V, 578.

<sup>2</sup> February 14, 1821.

Monroe and Tompkins had a majority and peace was preserved.

The most important immediate effect of this treatment of Missouri was that it was not yet a State. The restrictionists were immovable in their hostility to the Benton clause in the Missouri constitution, but it was soon known that their opponents were willing to join in a further compromise. One was speedily initiated by Henry Clay, who, on the second of February, made the first move toward the final settlement of the question, by asking for the appointment of a Grand Joint Committee of Conference. Both Houses concurred, the representatives elected twenty-three members and the Senate seven. Clay was made chairman of the House committee and Holmes, one of the Senators from Maine, was made chairman of the committee of the Senate.<sup>1</sup> Six days later this Grand Committee delivered its report, which agreed in substance with that lately made by the committee of thirteen. A short and rather sharp debate followed in the House, but the report was carried by four votes.<sup>2</sup> In the Senate it was carried by a vote of twenty-eight to fourteen. On the second of March the committee's report put in the form of a statute became the law. The Missouri legislature was to repudiate the Benton provision, which it did in August, and President Monroe was then to proclaim Missouri a State in the Union. This he did on the tenth of the month.<sup>3</sup>

The constitutional question at the root of the Missouri Compromise was whether the government of the United States could impose restrictions on a territory or a State, and particularly whether it could restrict slavery. The

<sup>1</sup> *Annals*, 1219.

<sup>2</sup> Eighty-six to 82.

<sup>3</sup> *Richardson*, II, 95.



whole question was essentially one of sovereignty. Thirty-seven years passed before this question reached the Supreme Court of the United States in the famous case of *Dred Scott*,<sup>1</sup> and the decision then rendered was speedily set aside by the Civil War. But during the intervening years the question was one of continuous discussion in one form or another. The final decision in 1857, was anticipated in 1820, as was also the dissenting opinion of Mr. Justice Curtis in the *Dred Scott* case. While the Missouri compromise was under discussion no less an authority than John Jay expressed the opinion that Congress had power to restrict slavery and to prohibit the importation and immigration of slaves in old States or in new ones, for slavery was repugnant to the principles of the Revolution.<sup>2</sup> This opinion was also held by Webster and was embodied by him in the memorial sent forth on slavery extension by the citizens of Boston in a public meeting.<sup>3</sup> He held that the power of Congress to regulate commerce gave it complete authority to regulate, and therefore, to restrict slavery. But there were contrary opinions of which the most influential were those held by Madison,<sup>4</sup> who asserted that restriction of slavery by Congress was unconstitutional, thus anticipating the decision of the Supreme Court in the *Dred Scott* case.

The Missouri Compromise was a triumph for national sovereignty in so far as it confirmed the authority of Con-

<sup>1</sup> *Dred Scott vs. Sandford*, 19 Howard, 393.

<sup>2</sup> Jay to Elias Boudinot, November 17, 1819.

<sup>3</sup> *Niles Register*, XVII, 242; *Wilson's Rise and Fall of the Slave Power*, I, 150; the memorial does not appear in Webster's Works; it was published in pamphlet form by Sewell Phelps, No. 5 Court St., Boston, 1819, and was reprinted, together with various speeches and documents on the Nebraska Question, by J. S. Redfield, New York, 1854.

<sup>4</sup> Letter to Robert Walsh; Works, III, 149.

gress to prescribe conditions for the territories and the States, but it was also a triumph for slavocracy in that a new slave State had been admitted into the Union. Time alone could determine whether the compromise would prove permanent. The great constitutional issues from the adoption of the Constitution to the adoption of the Missouri Compromise were essentially a series of contests between the States and the United States for sovereignty. As yet neither power had triumphed. The organization and administration of government were matters of compromise. We shall see how this spirit of compromise dominated another generation.



## CHAPTER II.

### THE CONTEST COMPROMISED.

While the Missouri Compromise was pending, events in South America were shaping an international policy for the United States, which was not of our own seeking and was destined to survive the period in which it originated and to give a unique position to our government. Early in the nineteenth century, the Spanish-American States revolted and asked the United States for recognition of their independence. The unsettled state of Europe, after the fall of Napoleon, led the ruling Houses of France, Russia, Prussia and Austria to unite for the purpose of maintaining peace and redressing revolutions within each other's domain, and especially to repress all attempts at liberal government. This was the so-called Holy Alliance of 1815. About this time the Spanish colonies in South America had met with such success in their efforts for independence, that Spain began to doubt her ability to subjugate them, and rumor passed through the world, that the Alliance contemplated offering assistance to Spain. Interference of this kind was construed by England as inimical to her interests, and Canning, her Prime Minister, intimated to our Ambassador at the Court of St. James, Richard Rush, that the United States should take decided action against it. President Monroe submitted the wishes of the British government to his cabinet, and also to Jefferson and Madison. The reply of Jefferson covered the whole principle involved. The question, he said, was the most momentous which had come before him since that of American independence. "That made us a nation; this sets our compass and points

the course which we steer through the ocean of time opening on us."<sup>1</sup> And he laid down a maxim which he thought should be fundamental in our government, that we should never entangle ourselves in the broils of Europe, nor suffer Europe to intermeddle with affairs this side of the Atlantic. "America, North and South, have a set of interests distinct from those of Europe and peculiarly her own. She should, therefore, have a system of her own separate and apart from that of Europe." The governments of the old world were laboring to become the home of despotism, but our endeavor should be to make the Western Hemisphere the home of freedom. In pursuing our true policy only one nation, England, could disturb us, but by acceding to her proposition respecting the South American republics, we could detach her from an unfriendly European alliance and bring her mighty weight into the scale of free government. "Great Britain," he concluded, "is the nation which can do us the most harm of any or all on earth, and with her on our side we need not fear the whole world."

A few days later Madison replied in the same spirit,<sup>2</sup> and the Cabinet mainly agreed with the opinions of the two ex-Presidents.<sup>3</sup> The result was the famous message which Monroe sent to Congress on December 2, 1823, proclaiming a policy which has received his name. The time had come, he announced, when it was proper to assert as a principle in our government, that the American continents, by the free and independent condition which they had assumed to maintain were henceforth not to be considered as subjects for colonization by any European

<sup>1</sup> October 24, 1823, *Works*, VII, 315.

<sup>2</sup> October 30, *Works*, III, 338.

<sup>3</sup> *Adams's Memoirs*, VI, 177, et seq., November 7-26, 1823.

power.<sup>1</sup> The British government did not conceal its satisfaction at this announcement.<sup>2</sup> Canning declared that the policy would prevent that line of demarcation which England most dreaded, the arraignment of America against Europe. But it was not the republican character of the policy that pleased England, for, as Canning expressed it, monarchy in Mexico and Brazil "would cure the evils of universal democracy and thus prevent drawing the obnoxious line." England wished in some way to counterbalance the power and influence of the United States. The Monroe doctrine, if carried out, would aid Great Britain in executing her own plans which were far removed from any desire to extend popular government over the earth. Canning welcomed the doctrine, because of its obvious advantage to his government. Monroe primarily intended that the doctrine should express the principle which Jefferson had laid down, that the Western Hemisphere should forever be the home of free institutions.

The Monroe doctrine did not originate with President Monroe, but developed from the application of a principle which had been laid down while yet the Constitution was before the people for ratification. Hamilton, in 1788, in the *Federalist*, had urged neutrality and a strong national government, observing with his usual acuteness, that our geographical situation would ever give us the ascendancy in American affairs, and that as we were bound together in an indissoluble Union we would be superior to European influences, and he added, be able to dictate terms between the old world and the new.<sup>3</sup> The doctrine of neutrality was enunciated by Washington as our true

<sup>1</sup> Richardson, II, 218; December 7, 1824, Id., 260.

<sup>2</sup> Wharton's *International Law*, I, (First Edition) 276.

<sup>3</sup> *Federalist*, No. XI.

national policy, in his proclamation of 1793, issued at the opening of the French Revolution,<sup>1</sup> and repeated by him in his seventh annual message<sup>2</sup> to Congress when the French Revolution was changing the political condition of all Europe. But the most familiar words of Washington on the subject, that we must steer clear of alliances with any portion of the foreign world, occurred in his farewell address in 1796.<sup>3</sup> The same policy of neutrality was urged, though in different ways and with a different understanding, by Adams and Jefferson. Adams urged it and advocated the alien and sedition laws in its support; Jefferson, in his inaugural, declared that it was the policy which nature had laid down for us,<sup>4</sup> and commended it again in a message to Congress in 1803.<sup>5</sup>

The first distinct announcement of the principle which Monroe advocated was made by Madison in 1811, when Great Britain was threatening to take possession of the Floridas. He then urged on Congress the seasonableness of declaring that the United States could not, without serious inquietude, see any part of a neighboring territory, such as Florida, in which we had deep concern, pass from the hands of Spain into those of any other foreign power.<sup>6</sup> It was during our second war with England that the revolutions broke out in Spanish-America, which may be said to have compelled us to apply the doctrine of neutrality in a practical way. Monroe in his first inaugural, pointed out that we should strengthen our military defenses and no longer rely upon our distance from Europe as our chief

<sup>1</sup> April 22; Richardson, I, 156.

<sup>2</sup> December 8, 1795; Richardson, I, 182.

<sup>3</sup> September 17, 1796; Richardson, I, 113.

<sup>4</sup> March 4, 1801; Richardson, I, 321.

<sup>5</sup> October 17, 1803; Id., 357.

<sup>6</sup> January 3, 1811.

security.<sup>1</sup> The war of 1812, brought home the idea of neutrality to the American people and awakened their sympathies for the struggling South American republics. It was an easy matter, therefore, for Monroe to follow the principle which his predecessor had urged, and the speedy success which attended the Spanish colonies in their revolt, gave opportunity for the United States to put the doctrine in practice. The affairs of these *quasi*-Republics reached such a stage in 1817, that our government felt obliged, while pursuing a policy of neutrality with Europe, at the same time to inaugurate one of commercial reciprocity with them. This new phase of our international relations marked a transition in our general policy as appears in the discussion of the subject by Monroe in his message to Congress in 1817.<sup>2</sup> The radical character of the change is apparent now and it may be said that since that time no political party has ignored the policy of neutrality or neglected to urge the extension of our commercial relations based upon the principle of the policy.

Monroe took up the subject again in 1818,<sup>3</sup> and declared that the United States had good cause to be satisfied with the policy which it had adopted. This was a strong advocacy of the policy when we consider Monroe's negative character as a statesman. During the summer of 1819, the new Republics formed stable governments. Monroe in his next annual message, convinced of the inability of Spain to regain her former Provinces, urged Congress to revise our laws so as to prevent all violations of neutrality. But in his general discussion of a neutrality policy he carried its meaning a step nearer one of a

<sup>1</sup> March 5, 1817; Id., II, 4.

<sup>2</sup> December 2; Richardson, II, 11.

<sup>3</sup> November 17, 1818; Id., 39.



guarantee by the United States of the supremacy of republican institutions in both North and South America.<sup>1</sup> During the five years that followed the idea strengthened in America that our government was the natural protector of the Western world<sup>2</sup> and its republican institutions. Thus far our government had never been consulted respecting any European policy, and European nations still looked upon South America as an open field. This was the general situation when Canning began correspondence on the subject with our government in 1820.

The immediate effect of the promulgation of the Monroe doctrine was to assure the new Republics of their independence, but it should be added, opinions have since widely differed, whether in any sense it pledged the United States to maintain a protectorate over them, but there is little doubt that the American people had already reached the conclusion that the doctrine pledges them to protect republican institutions in the new world. Certainly Monroe's announcement and the moral support which it immediately received and has since received, put an end to all dreams of European interference in American affairs and practically foretold the ultimate retirement of Spain from the new world. England promptly recognized the policy, but with one exception it has been formulated by only one branch of our government. In January, 1824, Clay embodied the doctrine in the resolu-

<sup>1</sup> December 7, 1819; *Id.*, 254.

<sup>2</sup> See Adams to Canning, October 2, 1820; *Memoirs*, V, 182; see also Monroe's Fourth Annual Message, November 14, 1820; Second Inaugural Address, March 4, 1821; Fifth Annual Message, December 3, 1821; Special Message, March 8, 1822, in Richardson, II. Gallatin to Chateaubriand, Gallatin's Writings, II, 271; Adams to the Russian Minister, *Memoirs*, July 17, 1823, VI, 163; Adams to Richard Rush, July 22, 1823; *Register of Debates*, 1825-1826, II, Part 2, p. 31.

tion which he offered in the House of Representatives,<sup>1</sup> but the resolution did not pass and Congress has never incorporated it specially in legislation. But the principle of the doctrine was asserted by the House of Representatives in its resolution of April, 1826, that the people of the United States, in case of European interference in American affairs, would consider themselves free to act as their honor and policy might at the time dictate.<sup>2</sup> In later times, no fewer than seven of our Presidents have reasserted the doctrine on critical occasions, and it has become a permanent quality of our diplomatic correspondence. It may now be said to have become a part of the unwritten law of the Constitution.<sup>3</sup>

<sup>1</sup> January 20; Benton's Debates, VII, 650.

<sup>2</sup> April 20, 1826; House Journal, 451.

<sup>3</sup> Tyler, December 30, 1842; Richardson, IV, 212; Polk, December 2, 1845, Id., 398; December 7, 1847, Id., 540 and April 29, 1848, Id., 582; Buchanan, December 6, 1858, Id., V, 512; and December 3, 1860, Id., 646; Grant, May 31, 1870, Id., VII, 61; December 5, 1870, Id., 129; Cleveland, December 2, 1895, Id., IX, 632 and December 17, 1895, Id., 655, (in re Venezuela.) Also see Clay to Minister Poinsett, March 25, 1825; Register of Debates, 1825-1826, II, Pt. 2, App. 84; Secretary Buchanan to Minister Hesse, June 4, 1838, Wharton's Digest, I, 287; Clayton-Bulwer Treaty, April 19, 1850; Treaties and Conventions, 441; Secretary Everett to Comte De Sartiges, December 1, 1852; Wharton's Digest 563; Secretary Cass to Minister Dodge, October 21, 1858; Wharton's Digest, I, 288; to Minister McLane, September 20, 1860; Id., 299; Seward to Minister Corwin, April 6, 1861, Senate Executive Documents, 37th Congress, second session, I, 69; Seward to Dayton, September 26, 1863, House Executive Documents, 38th Congress, First Session, II, 782; October 23, Id., 799; House Resolutions, April 4, 1864, Congressional Globe, 1863-1864, II, 1408; Seward to the Marquis De Monthalon, December 6, 1865, Senate Executive Documents, 39th Congress, First Session, I, 100; Seward to Minister Kilpatrick, June 2, 1866, House Executive Documents, 39th Congress, Second Session, I, Pt. 2, p. 413; House Resolution, March 27, 1867, Congressional Globe, 392; Report to President Grant by Secretary Fish, July 14, 1870, Senate Executive Document, 41st

The question of the constitutionality of protective tariff was raised in 1789 and again in 1816, but it was first exhaustively discussed in the debates on the tariff of 1824.<sup>1</sup> The National Republicans, under the leadership of Clay, advocated the principle of protection and found support for their arguments in the liberal construction of the Constitution, which characterized the decision of the Supreme Court under Marshall.<sup>2</sup> The whole matter of laying a tax, they claimed, was one of discretion with Congress. Moderate protectionists, of whom Webster at this time was one, held that the whole question was one of expediency.<sup>3</sup> He feared that if protection was carried too far commerce would be destroyed. The advocates of a tariff act of which the distinctive feature would be its revenue clause, preferred the opinion which Webster had uttered in 1820, that Congress has no power to determine what occupations society should follow and what it should abandon. They held that the rightful power of Congress to levy a tax went no further than to raise money necessary for the lawful purposes of the government. If the right to pass a tariff act depended wholly on expediency, its exercise would cease to respond to the necessities of the people, but would be determined by politics only. The attitude of parties over the tariff of 1824, did not materially change in later times. The National Republi-

Congress, Second Session, III, No. 112, pp. 7, 9: Hayes's Special Message, March 8, 1880, Richardson, VII, 585: Secretary Blaine to Minister Morgan, June 1, 1881, Wharton's Digest, I, 331: to Minister Lowell, November 19, 1881, Id., II, 212: to Minister Trescot, December 1, 1881, Wharton's Digest, I, 344: Secretary Frelinghuysen to Trescot, January 9, 1882, Id.: to Minister Reid, January 4, 1883, Id., 295; Harrison's Inaugural, March 4, 1889, Richardson, IX, 10.

<sup>1</sup> Act of May 22, 1824; Statutes at Large, IV, 25.

<sup>2</sup> *Gibbons vs. Ogden*; 9 Wheaton, 1 (1824.)

<sup>3</sup> Works, III 94; Speech of April 1 and 2, 1824.

cans grounded their faith in the matter of national expediency and a liberal construction of the Constitution. Finding a well made up creed in that celebrated report on American manufactures, which Hamilton, while Secretary of the Treasury, made to Congress in 1791. The Democrats, following the letter of the Constitution, stood substantially on the same ground which Jefferson had taken when he opposed chartering the first United States bank. The tariff of 1828, styled by its enemies, the tariff of abominations, reopened the whole controversy of the power of Congress to levy taxes, and was the immediate cause of a great struggle and ultimately of a great compromise which followed.

Jackson came to the Presidency in 1829, convinced that he was the chosen of the people to institute great public reforms.<sup>1</sup> His inauguration occurred amidst the debate over the tariff. He left no one in doubt of his own understanding of the method in which the revenue should be raised and distributed. It should be done, he said, without discrimination against any great interest in the country, and he was careful to draw a parallel between this nice balance of administration and the distinction between the rights of what he called the sovereign members of the Union and the powers which they had granted to the Confederacy; for the States were still considered sovereign, and the Union was still called a Confederacy. Jackson professed to take a strict construction view of executive powers. The President should administer the laws. The tariff act of 1828 was scarcely in the statute books before vociferous protests were heard from various quarters. Five Southern States pronounced it destructive of the best interests of their people.<sup>2</sup> Protests of this kind had

<sup>1</sup> Inaugural, March 4, 1829; Richardson, II, 436.

<sup>2</sup> Georgia, Alabama, North Carolina, South Carolina and Virginia, 1828-29; reprinted in Elliot's pamphlets.

often been heard. New England had uttered them against the treaty of 1803. The Hartford Convention had expostulated against the war of 1812, and the policy of the administration which conducted it. Long before this, Georgia had set a precedent for such protests, when in 1794, it refused to abide by the decision in the *Chisholm* case. And again thirty-five years later, when it refused to sustain the decision of the Supreme Court in the case of the Creek and Cherokee Indians.<sup>1</sup> But the ground of protest against the tariff of 1828, was much firmer than that on which these earlier precedents rested. The economic condition of the country had changed, the South had continued agricultural, the North was becoming manufacturing. Whatever prosperity might follow a protective tariff, therefore, the South inclined to believe, would attach to Northern interests, while the South would be taxed for its prosperity. The law, therefore, according to Southern protest, was a discrimination against a large section of the Union. On this economic interpretation of the tariff of 1828, rested the whole case of nullification. It must not be understood that the South stood alone in its opposition to the tariff. Low tariff, anti-tariff and free trade opinions were heard here and there all through the North, and found means of utterance in innumerable meetings, which varying in their degrees of influence, straightway proclaimed their hostility to a tariff, usually through pamphlets and the journals of their proceedings.<sup>2</sup>

<sup>1</sup> *Worcester vs. State of Georgia*, 6 Peters, 515; *Niles Register*, XXXVI, 258; XXXVII, 189; XLIII, 227.

<sup>2</sup> As a type of these see the Preamble and Resolutions debated at the Exchange Coffee House, preparatory to choosing delegates to the Anti-Tariff Convention, Boston, August 16, 1831; *Journal of the Free-Trade convention*, Philadelphia, September 30 to October 7, 1831; *Memorial Address of its Committee to the People of the United States*, New York, 1832.

But the classic and accepted exposition of all anti-tariff opinions was embodied in the South Carolina "exposition of 1828," made by the legislature. It was in elaboration of this doctrine that Calhoun wrote one of the most famous letters in our history.<sup>1</sup> Before outlining this important letter, it is necessary to trace the course of events in Congress.

The protectionists did not at first understand the deep significance of the Southern protests, and inclined to look upon them as nothing more than the usual political fulminations of a minority party. About the time of their appearance a very irrelevant, but convenient question, relating to the public lands, came up in the Senate.<sup>2</sup> It was seized by the leaders of the nullification movement as an opportunity for attacking the tariff and the whole body of interpretation on which it was based. The whole matter in brief was this: did the tariff, because of its protective feature, discriminate against portions of the Union? And in imposing it had Congress violated the true meaning of the Constitution?

The debate on the public land resolution attracted little attention till the nineteenth of January, when Senator Hayne, of South Carolina, in a powerful speech, charged New England with harboring designs of checking immigration into the West, and the South appealed to this part of the country to unite with it against the East in a policy of free trade and public lands on easy terms. To this attack on his native region, Webster replied on the following day and exposed the groundlessness of Hayne's charges.<sup>3</sup> The speech was a marvel of merciless logic not

<sup>1</sup> To James Hamilton, Governor of South Carolina, August 28, 1822; Calhoun's Works, VI, 144-193.

<sup>2</sup> Foot's Resolution on the Public Lands, December, 1829.

<sup>3</sup> January 20, 1830; Webster's Works, III, 248.

unmingled with sarcasm, by which Webster believed he had reduced Hayne's accusations to an absurdity. The manner rather than the matter of the speech offended Hayne. On the twenty-first, he addressed the Senate again,<sup>1</sup> and particularly Mr. Webster, on whose presence he insisted, and discussed the great question of the foundations of our government. The fundamental question, he said, was whether the colonies when they became independent nations, intended to form a federal or a national union. The question was older than the government, for it had been discussed down to the last detail in the ratifying conventions of 1788.<sup>2</sup>

In his answer, the day before, Webster had ridiculed the idea embodied in the South Carolina protest, that a State has a constitutional remedy in the exercise of its sovereign authority for a gross, palpable and deliberate violation of the Constitution. A union such as would be formed among sovereign States he stigmatized as a mere rope of sand. But this was only Webster's opinion, whose personal authority did not satisfy Hayne. He threw into the opposite scale the authority on which, he said, South Carolina relied, the doctrine contained in the report of its legislature in December, 1828, and known as the South Carolina exposition. He believed that this authority far outweighed Webster's personal opinion. It was "the good old Republican doctrine of '98,—the doctrine of the celebrated Virginia resolutions of that year, and of Madison's report of '99, that the powers of the Federal Government result from the compact to which the States are parties, are limited by the plain sense and intention of the instrument constituting the compact and are in no way valid other than as they are authorized by the grants enumerated

<sup>1</sup> Johnston's *American Orations*, I, 213.

<sup>2</sup> See Index, "Sovereignty."

in that compact." From this doctrine there followed the conclusion that in case of a deliberate, palpable and dangerous exercise of powers, not granted by the compact, the States, which were the contracting parties, had the right and were in duty bound to interpose for arresting the progress of the evil and for maintaining within proper limits their own authorities, rights and liberties. Nor was this all; Kentucky had responded to Virginia, and through its legislature had sent forth, on the tenth of November, 1799, the celebrated resolutions penned by Jefferson, which declared that the States, each acting for itself, were the final judges of the extent of the power delegated to the general government. The doctrine of these resolutions had gone before the country, had become a great issue in 1800 and had then been settled by the election of Jefferson and by turning over to him and his associates the control of the federal government, and this, as Jefferson himself had said, had saved the Constitution at its last gasp. Hayne elaborated this doctrine of nullification, and concluded with the assertion that though the tariff had prostrated, and would soon ruin the South, this great disaster was not the chief ground of her complaint; she was most deeply concerned in the principle involved. The discussion of Congress had been substituted for the limitation of the Constitution, and thus the States and their people had been brought to a dependence on the vote of the federal government and were left nothing which they could call their own. If this condition of affairs continued there remained but one remedy, that which the immortal Hampden had implied, "resistance to unauthorized taxation."

The South had spoken with no uncertain doctrine and in no uncertain tone. Who from the North could reply? The strength of Hayne's speech lay in its historical and



tionality of its laws. This raised the old question of sovereignty, and in answering it he planted himself by the side of the authors of the Federalist. Sovereignty, he argued, is in the nation, and a residuary sovereignty is in the States.<sup>1</sup> Like William Penn, when he established the most liberal of colonial governments, Webster placed the power with the people, in whom he declared, the ultimate political sovereignty of the nation has ever been found. And then he gave that definition of the American Union, which may be said to be the oldest and the most complete in our history: "I hold it to be a popular government elected by the people; those who administer it responsible to the people and itself capable of being maintained and modified just as the people choose it should be. It is as popular, just as truly emanating from the people as the State Governments. It is created for one purpose, the State Governments for another. It has its powers, they have theirs. There is no more authority with them to arrest the operation of a law of Congress, than with Congress to arrest the operation of their laws. We are here to administer a Constitution emanating immediately from the people and trusted by them to our administration. It is not the creature of the State government." The remedy for unconstitutional laws for which Hayne had contended, must unavoidably result in direct collision, force meeting force. A doctrine, said Webster, which goes the length of revolution. It was incompatible with any peaceful administration of the government, and would lead directly to civil commotion and disunion. When the last words of this most famous speech in the history of Congress were spoken, "liberty and Union now and forever, one and inseparable," and their reverberation through the Senate Chamber had ceased, no man present

<sup>1</sup> Federalist, Nos. XXXII and LXXXI.

was longer in doubt what Webster understood by the Constitution of the United States. His great speech went forth to the world as the exposition of American nationality, and lovers of the Union everywhere hailed him as the Expounder and Defender of the Constitution.

During Hayne's speech, Calhoun sat opposite him, drank in his words and was satisfied. Nullification had found a voice more eloquent, though no more faithful, than his own. Henceforth, thought he, the youth of the South need only recite the burning words of Hayne to arouse an oppressed people to sacred resistance to unjust laws, and history would be Hayne's best friend. His speech passed at once into literature and became a popular selection at school and college. Whatever Hayne had failed to do, he had not failed to write his name in the memory of the Southern people. Webster's reply also passed into our literature. Cicero took delight that, during his lifetime, the boys at Rome were taught in the schools to recite his orations; Webster's reply to Hayne was honored in like manner. To-day the memory of thousands goes back to the district school house sunning itself like a beggar beside the dusty road, and to the time when the neighborhood gathered within it to hear the boys speak their last pieces; one recited Hayne's speech on nullification; another Webster's reply, and even their feeble repetition stirred the passions of the listeners. It was a tribute to the powers of ideas. Webster's reply is a mile-stone in our constitutional history. It was the first forensic utterance which put our political institutions into perspective and clothed them with the imperishable beauty of literature. It projected them into all time. Appealing to the sensibilities of the American people he put their aspirations into palpable form, and since the day of his great reply to Hayne, writers and speakers of every political school have

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quarried from the rich mines of his imagination and eloquence. More than this, his logic and lofty political economy remain the convincing proof of the rightful sovereignty of the Nation.<sup>1</sup>

Webster in his reply forsook economic ground and made his argument almost wholly constitutional. The two debaters were advocates of antagonistic political systems. The United States was not industrially homogeneous at this time and a true national Union was impossible without such homogeneity. Thus the discussion was largely one of abstract propositions, not one of concrete industrial interests. Had it been limited to economic conditions

<sup>1</sup> An instance of the force and influence of Webster's method and style is related by Herndon in his *Life of Lincoln*. At the close of the Republican State Convention of Illinois, which nominated Mr. Lincoln as its candidate for United States Senator, he delivered the epoch-making speech on the "House Divided Against Itself" (June 16, 1858, *Works*, I, 240), which it has often been said made him President. Long before the world knew the history of its preparation, the similarity between its opening paragraph and the exordium of the reply to Hayne, had doubtless been observed. "It may not be amiss to note," remarks Herndon, "that in this instance Webster's effort was carefully read by Lincoln, and served as his model." When late in January, following his election to the Presidency, he was considering the preparation of his inaugural, he made a list of the works he wished to consult, and asked Herndon, his law partner, who possessed a respectable collection of books, "to furnish him his Henry Clay's great speech, delivered in 1850; Andrew Jackson's Proclamation against nullification and a copy of the Constitution." He afterward called for Webster's reply to Hayne, a speech which he had read when he lived at New Salem, and which he always regarded as the greatest specimen of American oratory. With these few master-pieces and no other source, he locked himself in a room upstairs over a store, across the street from the State House, and there, cut off from all communication and intrusion, prepared the address. See Herndon's *Lincoln*, (Edition 1889) pp. 400, 478. The simplicity, eloquence and power of Lincoln's first inaugural appeal to us even more strongly when we know that his genius had been touched by the inspiration of the great reply.

some have thought that Webster would not have presumed to make reply. But as soon as Hayne attempted to meet Webster on constitutional grounds he was defeated. The great debate by no means settled the question at issue.

In October, South Carolina took the fatal step of calling a convention<sup>1</sup> for the purpose of nullifying the tariff act, and soon issued a nullification ordinance,<sup>2</sup> which was followed three days later by a message of like import to the people of the State, from the Governor.<sup>3</sup> At this crisis Calhoun resigned the Vice-Presidency to defend nullification, and was speedily returned to the Senate.<sup>4</sup> In the form of a letter to Governor Hamilton, he made an exposition of the doctrine of nullification, which remains to this day its classic interpretation.<sup>5</sup> It is a brief but comprehensive treatise on the subject of nullification, and its teachings are the inevitable conclusion from the premises laid down in the second Kentucky resolutions. According to Calhoun, the Constitution was formed and adopted not by the people of the United States, but by the States as independent and sovereign corporations. Collectively they had never performed a single political act. Whatever relation existed between the individual citizens of a State and the general government, was through the State, from which the conclusion followed that the Union was not one of individuals, as Hamilton had attempted to show, but of States as separate communities. The Constitution had been submitted to the States for their separate ratification and action. If ratified by one of them or by all except one it created no relation between a State and the general government and imposed

<sup>1</sup> October 24, 1832, Niles, XLIII, 152.

<sup>2</sup> November 24; Congressional Debates, IX, App., 154.

<sup>3</sup> November 27; Niles, XLIII, 159.

<sup>4</sup> December 12, 1832.

<sup>5</sup> Calhoun's Works, VI, 144.

not the slightest obligation. North Carolina and Rhode Island, Calhoun claimed, stood for a time in the relation of a foreign State to the general government.<sup>1</sup> As a State thus remained a sovereign body in the Union it possessed authority to pronounce an unconstitutional act of the General Government null and void.

Calhoun did not claim that a State has the right to abrogate an act of the government; such an act, he believed, being void of itself, for he conceived that the Constitution annulled an unconstitutional act. A State had the right to declare the extent of its obligations, from which, if true, it followed that the allegiance of the citizen was due primarily to his State. Webster, while recognizing the contractual relations created by the Constitution, also recognized it as the great organic act of the Nation; Calhoun viewed it as a treaty which the sovereign States had entered into, from which it followed, that the general government was only the agent of the States, and he insisted that this interpretation agreed with the original intention of the makers of the Constitution, who in none of its provisions had empowered it in any way to control a State. Indeed, they had refused to clothe the Supreme Court with this high power. They had made the government a confederation. Party folly had carried through the alien and sedition laws, but public opinion, referring to the election of Jefferson, quickly saved the government from the consequences of its error. For unconstitutional acts of any kind nullification was the rightful remedy. The Confederation could not coerce a State nor infringe the rights of any without violating the Constitution. Even if nullification resulted in secession, a State would still remain in its original relation as

<sup>1</sup> For the discussion of the status of North Carolina and Rhode Island as understood at this time by these States, see pp. 169-187.

a foreign power to the others. Secession, he said, would never place a State beyond the pale of these federal relations, for they were the relations existing between independent powers. Nullification and secession were two different processes, the one was an act affecting the several parties to the government, the other affected the government itself. Thus, secession would dissolve the Union while nullification would confine the government generally within the limits of its powers; whence the conclusion that it was the true constitutional remedy for unlawful acts of the government.

Stripped of subtle distinctions, Calhoun's ideas were expressed in the form of an address to the people of the United States and sent forth nearly thirty years later by the South Carolina convention.<sup>1</sup> The tariff laws, and particularly the supplementary acts of May twenty-ninth and July fourteenth, 1832, were declared null and void, and going the full length of the theory of State sovereignty, South Carolina issued this address, not through its legislature, but through a convention specially called for the purpose, and conceived to be sovereign in its powers.<sup>2</sup> The nullification act of South Carolina led Jackson to issue that famous proclamation, in which he denied the great issue involved, and which remains the best known of his State papers. Nothing in his career up to this time,

<sup>1</sup> *Journal of the Convention of the People of South Carolina, assembled at Columbia on the 19th of November, 1832, and again March 11, 1833; Reports and Ordinances, Columbia, 1833.*

<sup>2</sup> For the doctrine of sovereignty in the convention, see the report of the Chief of the Department of Justice and Police, on the Powers of the Convention (L. W. Hayne to Governor Pickens) in Appendix of the Fourth Session of the Convention of the People of South Carolina, held in 1860, 1861 and 1862; Columbia, South Carolina, 1862, pp. 649, 667; also *Sproule vs. Fredericks*, (1892) 62 Mississippi, 898.



had led anyone to suppose that he would take the stand he now took in his treatment of nullification. Extreme men of his own party confidently anticipated that he would either support the South Carolina doctrine, or by a neutral course at least avoid antagonism in such a way as practically to admit its truth. He did neither. "I consider the power to annul a law of the United States, assumed by one State," said he in the proclamation, "incompatible with the existence of the Union contracted expressly by the law of the Constitution, unauthorized by its spirit, inconsistent with every principle on which it was founded, and destructive of the great object for which it was formed."<sup>1</sup>

On the sixteenth of January, he followed the proclamation by a message on nullification, in which the South Carolina ordinance was analyzed, its character and probable effects exhaustively considered, and the relations between the States and the United States clearly set forth. The State of South Carolina had now forced the general government to decide whether it would allow any State to obstruct the execution of federal laws within its own limits, or to withdraw from the Union. The President pronounced both purposes revolutionary, and denied the right of the people of a State to secede from the Union without the consent of the other States. The Constitution, he said, in all cases in which it might be alleged that the general government had transcended its powers prescribed the mode of redress. Secession was the *ultima ratio* which presupposes that all other means of redress had failed. Admitting that the federal government was essentially a social compact, he carried the effect of its organization further than Calhoun, that it bound the several States and their citizens. Moreover it was fully

<sup>1</sup> December 10, 1832; Richardson, II, 640.

empowered in the nature of the government to protect itself. The Constitution provided various means of redressing a so-called unlawful act; to none of which had South Carolina appealed, but in effect had defied them all. Its defiance consisted in threatening to separate from the Union, if the federal government made any attempt to enforce its revenue laws within the States, and for the purpose of executing its defiance, the legislature had hastily passed several laws making it a penal offense for any citizen of the State to assist the United States in any way in collecting the revenue.

To the attack on the federal revenue acts, Jackson replied that no revenue had been raised beyond the necessary wants of the country, that the revenue had been imposed without discrimination against any State, and the laws particularly complained of had been made "with the express assent of a part of the representatives of South Carolina." While obstructing the execution of these laws South Carolina still claimed to be a component part of the Union and continued to participate in the national councils, nor had it refused to share in the public benefits of the general government. The duty of the government, therefore, Jackson thought, seemed plain; to recognize the State as a part of the Union and subject to its authority; to indicate the just power of the Constitution; to preserve the integrity of the Union and to execute the laws by all constitutional means. All these obligations in so far as the executive was a branch of the government, the President had sworn faithfully to perform, and the Constitution which empowered him to act also conferred on Congress ample authority to carry its powers into effect. There was, therefore, no lack of authority in the general government to defend itself and to execute its laws. The President then reviewed the various revenue acts since

the organization of the government, proving their consistency, and as he believed, their constitutionality, and also reviewed the acts which empowered the government to use force if necessary in executing its laws. He left no man in doubt whether he would spare any effort to discharge the duty which in this conjuncture devolved upon him. Nor did he doubt the co-operation of Congress. His duty and theirs were plain: the Constitution and the laws, concluded he, are supreme and the Union indissoluble.

The proclamation was a less technical and more popular paper, and its presentation of the principles of American government ranked it with the Declaration of Independence.<sup>1</sup> It may be called the first proclamation of its kind in our history; a popular exposition of the national character of the general government. An utterance of this kind was hardly to be expected from a President of the Jeffersonian school. But had Jefferson himself stood in Jackson's shoes, there is little doubt that he would have spoken in like manner. Jackson met fairly and controverted thoroughly every point which Calhoun had made in his famous letter to Governor Hamilton on nullification. The Constitution of the United States, wrote Jackson, forms a government not a league, and whether it be formed by a compact between the State or in any other manner, its character is the same. To say that any State might at pleasure secede from the Union was to say that the United States are not a Nation, a word seldom written in this sense before 1863. "The States severally have not retained their entire sovereignty," continued Jackson, "for in becoming members of a Nation, not members of a league, they surrender many of their essential parts of

<sup>1</sup> See note on Lincoln's utilization of the Proclamation, p. 396, ante.

sovereignty." If South Carolina was sincerely anxious to remedy any supposed grievance, plainly its duty was to proceed in one of the methods pointed out by the Constitution: either to amend the supreme law through the initiative of Congress, or through a convention called by two-thirds of the States.

But the power of Jackson's proclamation, it must be admitted, lay not so much in its argument and in its reply to Calhoun and his disciples, as in its appeal to the American people, and especially to the citizens of South Carolina to sustain the Constitution and the laws of the government. It clearly defined the issue: Union or disunion. "Be not deceived by names," concluded his appeal to the people of that State, "disunion by armed force is treason. Are you really ready to encourage guilt? If you are, on the heads of the instigators of the act be the dreadful consequences; on their heads be the dishonor, but on yours may fall the punishment. On your unhappy State will inevitably fall all the evils of the conflict you force upon the government of your country. It cannot accede to the mad project of disunion of which you would be the first victims." Before a generation had passed away these words had proved a prophecy.<sup>1</sup>

The response of the Nation to the President's proclamation was immediate and overwhelming. Public meetings were held all over the Union and the State legislatures, with few exceptions, passed resolutions commending the President's course and condemning South

<sup>1</sup> A remarkable fulfillment of this prophecy is recorded in the Appendix of the Journal of the Convention of South Carolina, held in 1860, 1861 and 1862, together with the Ordinances, Reports, Resolutions, etc. Published by order of the Convention, Columbia, South Carolina: R. W. Gibbes, printer to the Convention, 1862, pp. 459-801.

Carolina.<sup>1</sup> But it was the prompt action of the President and Congress which constituted the most important reply to the South Carolina ordinance and the argument of Calhoun. Preparations were made to collect the duty by force.<sup>2</sup> The collector of the port of Charleston was duly instructed, and troops, under charge of General Scott, were sent to the State,<sup>3</sup> and the navy was ordered to support him. A collision of authorities seemed certain. At the height of the excitement Clay came forward with a compromise tariff act, which provided for a gradual decrease of the duties, which was passed,<sup>4</sup> the immediate effect of which was the suspension of the nullification ordinance by South Carolina and its repeal soon afterward.<sup>5</sup> Jackson kept constantly informed of the state of affairs at Charleston, and one of his political lieutenants, writing on the day after the repeal, described the conclusion of the whole matter. Clay's bill and the stern purpose of the President to enforce the law, had changed the hearts of many of the nullifiers, so much so, that when the convention assembled, on the fifteenth of March, only four of them voted against a repeal of the ordinance, because they thought that Clay's bill "did not fully abandon the principle of protection." But McDuffie, who divided

<sup>1</sup> For a typical set of Resolutions (with citations of those of other States) see the Resolves of the General Court of Massachusetts, January, 1832, to April, 1834; pp. 290-408, 646: see the New Hampshire Resolutions against legislation "On the Subject of the Tariff and the Doctrines of Nullification," July 6, 1833; Laws of New Hampshire, Concord, 137.

<sup>2</sup> The Force Bill was passed March 2, 1833, empowering the President to suppress obstructions to the laws by military force or other means within any State; Statutes at Large, IV, 634.

<sup>3</sup> October and November, 1833; Congressional Debates, IX, App. 187, et seq.

<sup>4</sup> February 26, 1833.

<sup>5</sup> March 16, 1833.

with Calhoun the leadership of the nullification movement, spoke "lovingly" of Clay as "our ally in the West whom we have recently gained," and congratulated the convention on the triumph of nullification through Clay's compromise act.<sup>1</sup> To crown all, Governor Hamilton made a conciliatory speech, and the offensive ordinance was repealed. Jackson's endorsement of this letter was forceful, characteristic and unique, a tribute which he would willingly have seen inscribed as an epitaph for the authors of nullification: "The Ordinance & all law under it repealed—so ends the wicked & disgraceful conduct of Calhoun, McDuffie & their co nullies. They will only be remembered, to be held up to scorn, by every one who loves freedom, our glorious constitution & government of laws."<sup>2</sup>

<sup>1</sup> Clay's part in the compromise has been the subject of endless discussion, the central theme of which is whether he in any way "abandoned the policy of protection." Whether or not he really did so, it would seem that many Southern Democrats believed that he did. This Southern opinion comes to light in the correspondence of later years, thus the Honorable W. W. Payne of Gainesville, Alabama, writing to Blair and Rives, April 29, 1843, (MS. letter) says: "I find that the Whigs of the South are going to take the novel ground of denying Clay to be a protective tariff man; with the less informed this may have some influence, but as the advocacy of the protective policy will destroy any man in this latitude my object is to fortify myself with the necessary proofs on this point. That H. Clay is a protective tariff man, we all know, but I want the proof of the fact."

<sup>2</sup> MS. letter Augustus Fitch to the President of the United States, Columbia, March 16, 1833. The extreme nullifiers were a minority in the Democrat party at the South, as the correspondence of the times shows, thus the correspondent of Francis P. Blair, Editor of the Globe, signing himself a Clark man, and writing from Milledgeville, Georgia, May 28, 1832, says: "Never was any party more opposed to any doctrine than the Clarke party of Georgia are to anti-Republican disorganization and consolidating heresy nullification, as set forth by some of the leading politicians of South Carolina;" and again speaks of the doctrine as that of "the odious principles of nullification."

Thus the great issue involved in nullification was compromised. On the constitutionality of nullification, men were left to differ. It was an old issue, older than the government, and had come up in one form or another repeatedly. Was the Union a Confederacy or a Nation? Webster and Hayne had discussed this question at the time of the Foote resolution, and Webster and Calhoun discussed it again when the force bill passed.<sup>1</sup> According to Calhoun, the political system under which the American people lived, was a compact the parties of which were separate and sovereign communities, the several States. Because of its sovereignty, each State had the right to judge for itself whether Congress had violated the Constitution and in case of violation to choose its own mode and measure of redress.<sup>2</sup> Ours was a federal system and with it went all the consequences of such a system. The practical effect of this theory was nullification, it remained for time to show whether it would also be secession.

Against this theory of the government Webster maintained that the Constitution of the United States was not a league, confederacy or compact between the people of the several States in their sovereign capacities, but a government prepared and founded on the adoption of the people and creating direct relations between itself and individuals. No State had power to dissolve these relations, revolution alone could dissolve them. In all cases in dispute between the States or the people of the United States, capable of assuming the character of a suit, the Supreme Court was the final interpreter. Any attempt by a State to nullify an act of Congress on the ground that

<sup>1</sup> February 15-27, 1833.

<sup>2</sup> Calhoun, February 15, 16, 1833; *Works*, II, 198, *et seq.*: see also *Id.* 262, *et seq.*

in its opinion that act was unconstitutional, was a "direct usurpation of the just powers of the government and of the equal rights of their States; a plain violation of the Constitution and proceedings essentially revolutionary in its character and tendency." Whether the Constitution was a compact in its sovereign capacity was a question, Webster maintained, which must be mainly argued from what is contained in the instrument itself. This declared itself to be a Constitution, "not a league, compact or confederacy, but a fundamental law." To espouse the doctrines of nullification was to reject the first great principle of republican government,—that the majority must govern.<sup>1</sup> Nullification, therefore, meant secession, secession would be revolution and must terminate in the destruction of the Union. The great issue whether the Union was a Confederacy or a Nation was compromised, but not settled at this time. The Compromise of 1833, neither convinced the nullifiers that they were wrong, nor established beyond doubt in the public mind the national character of the general government. Clay's compromise tariff act<sup>2</sup> so modified the duties imposed by the act of 1832, as to amount in the opinion of aggressive Northerners almost to a surrender of the policy of protection, and to that degree to acknowledge the right of nullification. The force bill passed on the same day of Clay's compromise and constituted the national part of the general action, but went no further than particularly to authorize the President to execute the laws. To that extent it supported the President's proclamation and Webster's theory of the Union. But there was a more ragged edge to the Compromise of '33, than to that of 1820. It was

<sup>1</sup> Webster's speech in reply to Calhoun, February 16, 1833; Works, III, 451, et seq.

<sup>2</sup> March 2, 1833; Statutes at Large, IV, 629.



more difficult to harmonize contending factions. The reason is not far to seek; at the time of the Missouri Compromise, the question at issue was comparatively abstract; the right of the general government to impose conditions on a territory or a new State. The issue now was largely concrete and administrative; economic, if you please, and therefore, more difficult to compromise. It will always be an interesting question whether the Union was continued in 1833, rather by means of the compromise measure of Clay than by the executive vigor of Jackson.

Another issue involving constitutional powers was at the front at the time of the Compromise of '33. During Jackson's first term, he had given notice that he was opposed to re-chartering the United States bank, and thus precipitated a conflict with that powerful institution. In his message vetoing the act of re-charter, he took issue with the Supreme Court on the constitutionality of a national bank, and reached the conclusion held by Jefferson, when the question first came up, that a bank was neither necessary nor proper, adding that for Congress to transfer its legislative power to a bank was to violate the Constitution. The forcefulness with which Jackson had exposed the fallacies of nullification was almost counter-balanced now by his curious interpretation of the powers of the three departments. He claimed that each must be its own guide in its opinion of the Constitution. "Each public officer, who takes an oath to support the Constitution, swears that he will support it as he understands it and not as it is understood by others;" the obvious consequence of which theory was that either Congress or the President had as much right to decide upon the constitutionality of an act, and perhaps their decision should have as great weight, as that of the Su-

preme Court.<sup>1</sup> "The opinion of the judges," continued this message, "has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control Congress or the executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve."<sup>2</sup>

This was a novel theory of constitutional interpretation, but it consisted well with the individualism of Jeffersonian politics and appealed mightily to the party to which Jackson belonged. In the way in which he applied the doctrine it made him the most popular President the Nation has ever had. No one doubts the sincerity of Jackson's conviction, that the bank was dangerous to the safety of the government, hurtful to the morals of the people and unconstitutional. Preliminary to a systematic attack on the bank, he directed the Secretary of the Treasury no longer to deposit the money of the United States in the bank, but to deposit it in designated State banks. The Secretary refused to carry out the order and the President appointed his successor, Roger B. Taney, who speedily complied with the order, and defended its execution on the general ground of expediency.<sup>3</sup>

Jackson and his followers interpreted his re-election as a public approval of him and his policy, and as settling among other questions that of the constitutionality of the bank. But the Whigs, under the leadership of Clay, took up the issue and promptly began an investigation of the removal of the deposits.<sup>4</sup> Clay denied the constitutional

<sup>1</sup> See *per contra*, Webster, III, 416, 432.

<sup>2</sup> Veto Message, July 10, 1832; Richardson, II, 582.

<sup>3</sup> R. B. Taney, Secretary of the Treasury, December 4, 1833; Executive Document, No. 2, Vol. I, 1833-34.

<sup>4</sup> December 26, 1833.

authority of the President's action. Even if his re-election expressed the will of the people, it did not authorize him, Clay argued, to do such an unconstitutional act. Whig hostility took the form of two resolutions which Clay offered in the Senate. The first, declaring that the Constitution did not authorize the President to exercise the control over the Treasury Department which he had lately undertaken, and the second, pronouncing Taney's reason for the removal of the deposit wholly insufficient.<sup>1</sup> A long debate followed, which repeated most that had been said at the time of the first bank controversy; the Democrats reiterating Jefferson's arguments and the Whigs reiterating Hamilton's.<sup>2</sup> The friends of the bank took the President to task for violating the principle of contracts laid down by the Supreme Court in the Dartmouth College case,<sup>3</sup> and in a more recent case,<sup>4</sup> also decided by Chief-Justice Marshall. The immediate effect of the debate was a Whig resolution which the Senate adopted, censuring the President. Jackson made a vigorous protest to this left-handed method of impeachment.<sup>5</sup> But the Senate ordered that the protest, though specially directed to it, should not be entered upon the journal. This decision was the beginning of a series of calamities to the Whig party. Jackson began a vigorous campaign of which the ostensible leader was Thomas H. Benton, which terminated three years later in expunging the Senate resolution from the journal. During these three years, the Senate was transformed into a Democratic body. The Whig leaders, and conspicuously Webster, protested against the unconstitutionality of a resolution

<sup>1</sup> Benton's Debates, XII, 108.

<sup>2</sup> 1790. See p. 338, ante.

<sup>3</sup> Dartmouth College vs. Woodward, 4 Wheaton, 518, (1819.)

<sup>4</sup> Providence Bank vs. Billings, et al., 4 Peters, 514.

<sup>5</sup> Jackson's Protest, April 15, 1834; Richardson, III, 69.

that would thus alter the records, but the Democrats settled this point by passing the resolution to expunge, and carried it.<sup>1</sup>

The swift settlement of the West and the demand of its people for facilities for transportation had greatly strengthened the clamor for internal improvements at national expense. Clay was the mouthpiece of the supporters of the scheme, but the great obstacle in the way of its success was Jackson. Many Whigs were unable at the time to harmonize Jackson's national treatment of nullification with his repeated vetoes of internal improvement bills.<sup>2</sup> The contradiction was not difficult to explain to one who remembered that Jackson at heart was an ardent disciple of the State sovereignty school, and believed that each State should control all matters directly within its own limits. In applying this creed he only followed the practice of the government since Jefferson's time, excepting in the interregnum of John Quincy Adams, and held persistently with Monroe to the notion that Congress possessed no power to establish a system of internal improvements. He went so far as early in his administration to give notice that no bill which proposed such improvements would receive his signature. He even went so far as to veto a bill which appropriated money from the national Treasury for internal improvements in a State which had consented to them, and after Congress had disclaimed any jurisdiction over them.<sup>3</sup>

But this strict view of the Constitution forbidding internal improvements enabled Jackson to advocate the distribution of the surplus in the Treasury among the States, in 1836. The apparent contradiction here disap-

<sup>1</sup> January 16, 1837; Benton's Debates, XIII, 155.

<sup>2</sup> Richardson, II, 483, 493, 638; III, 118.

<sup>3</sup> Veto Message, May 27, 1830; Richardson, II, 483.

pears when we reflect that Jackson always emphasized the equality of the States in their claims upon the general government. Jefferson, on one of the few occasions when there had been a surplus in the Treasury, asked for an amendment to empower Congress to expend it in public education or in internal improvements; Jackson followed the simpler and the more direct method prescribed by the State sovereignty theory of dividing the surplus *pro rata* among the States, and allowing each to expend it as it saw fit.<sup>1</sup> Jackson's notions of the meaning of the Constitution were a factor which had to be reckoned with at a critical time in our history. In their broad outlines they agreed perfectly with the doctrine of residuary sovereignty in the State advocated by Hamilton and Marshall and sustained by the Supreme Court in later times.<sup>2</sup> But he differed from his predecessors and from most of his successors in the quantity of residuary sovereignty imputed to it. The purpose of his administration may be said to have been to preserve that nice adjustment of sovereignty in the nation and residuary sovereignty in the States which the fathers had attempted in the Constitution.<sup>3</sup>

Jackson's successor, Van Buren, took occasion in his inaugural to comment on this nice balance of federal and State sovereignty, and to announce that its preservation would be the chief object of his administration. His opinions of the Constitution were an echo of Jackson's and he said officially, that he asked no more than that his own administration might continue Jackson's policy. One positive declaration rose above the commonplace of his in-

<sup>1</sup> See the note p. 514, post, of the distribution in Maine.

<sup>2</sup> As in *Texas vs. White*, 7 Wallace, 700, (1868.)

<sup>3</sup> Inaugural, March 4, 1829; Richardson, II, 439: *Id.*, March 4, 1833; *Id.*, III, 3.

augural: his inflexible and uncompromising determination to oppose the abolition of slavery in the District of Columbia against the wishes of the slave-holding States, and to prevent the slightest interference with slavery in States where it existed.<sup>1</sup> The slavocrats promptly seized on this declaration as a solemn promise on the part of VanBuren, to withstand every attempt of the abolitionists to petition Congress for the limitation or overthrow of slavery. His administration, therefore, is chiefly of interest as a period and almost the beginning of the struggle over the right of petition, when exercised for the abolition or restriction of slavery.

Calhoun boldly announced such petitions a violation of the federal compact,<sup>2</sup> and throughout VanBuren's administration the pro-slavery party attempted, and practically succeeded in administering the government in accordance with Calhoun's theory of constitutional interpretation. The right of petition was too ancient and well settled to be long subjected to unlawful restraints, and

<sup>1</sup> March 4, 1837; Richardson, III, 318; "Yet Van Buren was charged of being an abolitionist. I hope you will try and vindicate Mr. Martin Van Buren's character from the infamous charges of the white Whigs as they call themselves, on the subject of abolition," writes a North Carolina correspondent to Blair and Rives, in 1836: "They charge him with being an abolitionist, yet it is well known that friends of the abolitionists are not the friends of Martin Van Buren." "I suggest the propriety of your furnishing the Globe with a well written article which will show how many abolitionists there are in Congress and how many there are of them opposed to our Republican candidates, (Van Buren and Johnson) and also whom they support and whom the Federalists of the old school, the nullifiers and abolitionists and bank pensioners are trying to elevate to the Presidency." MS. letter, George W. Hufham, Rokfish, Duplin County, North Carolina, June 11, 1836.

<sup>2</sup> See his resolutions of February 27, 1837, Benton's Debates, XIII, 567.

its denial in the manner proposed by Calhoun, precipitated a debate which continued almost without interruption through VanBuren's term. The question at issue in so far as it was a parliamentary matter was one of expediency rather than of constitutionality. But the pro-slavery party was under full control of the government and whatever may be said of its leaders its rank and file inclined to confuse constitutionality with expediency. Pro-slavery sentiments ruled Congress and the right of petition received a serious blow by the enactment of the notorious gag rule by the House in 1836, by which debate could be cut off at will.<sup>1</sup> For seven years this mere rule of procedure was an excuse for violating the Constitution,<sup>2</sup> but nearly all evils have their compensation, and it may be said that from the hour of its adoption dates the national movement against slavery.

Jackson and Calhoun had been hailed as leaders of reform in 1828, but the Nation grew tired of Democratic reforms and in 1840 the Whigs fancied that they had reformed the reformers by the election of Harrison and Tyler. Whig principles were supposed to be broad and liberal. But the death of Harrison, a month after his inauguration, struck down the hopes of the party. Tyler had never espoused Whig principles or sympathized with the Whig party, of which fact his veto messages speedily gave proof. He surpassed Monroe in zeal, though not in the prolixity of his river and harbor vetoes.<sup>3</sup> He outdid Jackson in his hostility to a bank.<sup>4</sup> And Calhoun hardly equaled him in hostility to a tariff bill possessing any quality of protection.<sup>5</sup> No other American President

<sup>1</sup> May 26, 1836, renewed January 13, 1837.

<sup>2</sup> The rule was repealed December 4, 1844.

<sup>3</sup> June 11, 1844; Richardson, IV, 330 and *passim*.

<sup>4</sup> August 16, 1841; *Id.*, 63; September 9, 1841; *Id.*, 68.

<sup>5</sup> June 29, 1842; *Id.*, 180; August 9, 1842; *Id.*, 183.

has taken so narrow a view of the Constitution as John Tyler. But his policy illustrated a not uncommon political paradox, of a strict construction President pursuing an almost unparalleled liberal construction policy, as was shown in his whole treatment of the Texas question, and especially in his recommendation to Congress to annex that republic to the United States by a joint resolution.<sup>1</sup> This mode of acquiring territory was novel. Tyler was anxious to have his name go down to posterity associated with a bold stroke of national expansion. His was an ambition to which some of our later Presidents have also fallen a victim. If Louisiana could be acquired by purchase, could not Texas be acquired by a joint resolution of Congress? Jefferson would have said something about a constitutional amendment, that the States be first consulted and their consent secured, but Tyler, whatever may be said of his loyalty to the party, thoroughly understood the tone of public sentiment in the country. He believed that the American people desired Texas, and he needed no proof that the Southern States demanded its annexation. As early as 1837, the Alabama legislature had led off boldly with a demand for its annexation, and was speedily followed by the legislatures of other Southern States.<sup>2</sup>

Tyler was like Jefferson in one respect, that he bravely abandoned strict construction when it seemed the politic thing to do. Congress promptly followed his advice with a joint resolution on annexation.<sup>3</sup> And the Texas convention composed almost entirely of American adven-

<sup>1</sup> December 3, 1844; Richardson, IV, 345.

<sup>2</sup> Alabama's Joint Resolution, December 25, 1837; January 1, 1842; for a summary of the Resolutions of State legislatures on the Texas question, see my Constitutional History of the American People, 1776-1850, I, 337-340.

<sup>3</sup> March 1, 1845.



turers, re-echoed its approval.<sup>1</sup> The joint resolution for annexation was no less novel than the admission of the new State into the Union without being required to submit a constitution of government republic in form and not conflicting with the Constitution of the United States; conditions emphasized so loudly at the time of the admission of Missouri.

The Democrats approved Tyler's policy, though repudiating Tyler, and nominated Polk and Dallas in 1844, on an expansion platform, the substance of which was that Texas should be "re-annexed" to the United States at the earliest practicable period. The Whigs were ominously silent on the whole question. Pro-slavery men among them demanded Texas as fresh slave soil; and the few anti-slavery men who had hitherto acted with the Whigs now joined the Free-Soil party. Whigs and Democrats stood toward the issues growing out of the Texan question much as the Federalists and Democratic-Republicans had stood toward the question of the acquisition of Louisiana. In both cases each party for the time being ignored its so-called principles. The immediate effect of the acquisition of Texas was war with Mexico, but it would be difficult to harmonize the policy of conquest pursued throughout Polk's administration, and which resulted in the acquisition of the California country, with the strict construction doctrines which Polk and his party before him had professed.<sup>2</sup>

If our conclusions relative to the meaning of the Constitution were to be drawn wholly from its interpre-

<sup>1</sup> July 4, 1845; see its Journal, July 4 to August 28, 1845, Austin, 1845; and its Debates reported by W. F. Weeks, Houston, 1846.

<sup>2</sup> See his message on the war, May 11, 1846; Richardson, IV, 437.

tation in the acts of political parties, we would be forced to conclude that the law of the Constitution is nothing more than the law of opportunism. The pro-slavery wing of the Democratic party having been successful in joining Texas to the United States, and transforming it from free soil to slave soil, saw a larger and more valuable acquisition in the California country; it should be added to the United States and together with Texas, be organized as a counterbalance to the vast region west of Missouri, and north of the line  $36^{\circ} 30'$ . If we properly weigh the dominant demands of slavery in the issue involved in the Mexican war, we will find that war, at least on our part, one of the most unjust and indefensible in history. The California country was bound ultimately to become a part of the United States, that was written in the laws of migration and the movements of population. Nor in strict construction of the Constitution can it be denied that the United States might acquire it either by treaty or conquest. At the time of the war, no man claimed that slavery was not the power which impelled us to the acquisition. But latent in the results of the war were economic questions which were to be solved in unexpected ways. Viewed strictly as an event in the constitutional history of the country, the annexation of Texas and its immediate effect, the Mexican war and the acquisition of the California country, were as bold an application of loose construction theory as that made by Jefferson in 1803. A dominating principle in American government was constantly being worked out, that the national Constitution could not be administered for the purposes laid down in its preamble unless it was broadly construed. The recognition of this principle was weakening the theory of State sovereignty. Whatever truth lay in this statement which Randolph had made in the Fed-

eral Convention respecting the jealousy of the States for their sovereignty, a larger truth was gradually disclosing the jealousy of the people for national sovereignty.

Expansion of our national domain to the Pacific, in 1848, revived the old question of slavery extension, and put the Missouri Compromise in an entirely new light. Complaints had long been heard from the South that Northern communities were refusing to aid in executing the fugitive slave act of 1793, and the half century of complaint now culminated in resolutions of Southern legislatures, which indicated less of widespread alarm at the conduct of the North toward the act of '93, than of determination to extend slavery to the Pacific.<sup>1</sup> The South was beginning to have dreams of a slave-holding empire stretching from the Atlantic to the Pacific, and southward far into the tropics. It was dreaming of controlling the markets of the world through a monopoly of the production of cotton.<sup>2</sup> But the realization of this dream would depend upon the security and extension of slave labor. The people of the slave-holding States began to talk of rights of property which were higher and deeper than the Constitution.<sup>3</sup> Congress, the legislature of Virginia claimed, had no power whatever over slavery.<sup>4</sup> The Louisiana legislature announced that the people of the South must maintain the rights of the South "peaceably if they can, forcibly if they must."<sup>5</sup> In every slave State the Mexican war was vindicated; acquisition of Texas

<sup>1</sup> See Alabama Resolutions, February 14, 1843, and the list referred to in notes, p. 423.

<sup>2</sup> Calhoun's letter to William R. King, August 12, 1844, in Calhoun's Works.

<sup>3</sup> Alabama Resolutions, January 27, 1845; Kentucky Bill of Rights, Constitution, 1850, Article XIII, Section 3.

<sup>4</sup> Virginia Resolutions, March 8, 1847.

<sup>5</sup> Resolutions, February 20, 1837.

was considered as nothing more than its re-annexation and the majority of the voters held that Congress had no power to impose conditions on slavery extension or to trespass on State sovereignty in any way.<sup>1</sup> Florida and South Carolina went further, for their legislatures urged that the South be put in a state of defense.<sup>2</sup>

The resolutions by Northern legislatures were less extreme but no less firm in their demands. There was unanimity of opinion that the joint occupancy of Oregon with Great Britain should cease.<sup>3</sup> Illinois strongly favored the re-annexation of Texas,<sup>4</sup> but toward slavery extension all the Northern legislatures were hostile. New York insisted that slavery should be forbidden in all the newly acquired regions.<sup>5</sup> The typical Northern resolution was that of Ohio,<sup>6</sup> which demanded that the ordinance of 1787 should be extended over all the territory acquired from Mexico, and the legislature of this State claimed that Congress had power to exclude slavery from acquired territory.<sup>7</sup> Thus, the North and the South agreed in demanding the expansion of the country to the Pacific, but disagreed over the extension of slavery. The extremes of opinion were expressed by the legislatures of Vermont and Virginia; the one declaring that the perpetuation of slavery was a violation of the national

<sup>1</sup> Mississippi Resolutions, February 25, 1842; South Carolina, December 17, 1841; Tennessee, February 7, 1842.

<sup>2</sup> Florida Resolutions, January 13, 1849; South Carolina Resolutions, December 20, 1850.

<sup>3</sup> Michigan Resolutions, March 11, 1844; Illinois Resolutions, February 21, 1843; February 27, 1845.

<sup>4</sup> Resolutions, February 27, 1845.

<sup>5</sup> Resolutions, January 27, 1847; January 13, 1848; January 16, 1850.

<sup>6</sup> Resolutions, February 13, 1847; February 25, 1848.

<sup>7</sup> Resolutions, February 24, 1848.

compact;<sup>1</sup> the other that any limitation of it or attempt to prevent the removal of slavery from the territory was unconstitutional. There could be no mistake in fixing on the great national issues, slavery extension, and it continued to develop ominous proportions until the adoption of the thirteenth amendment twenty years later. At the close of the Mexican war conservative anti-slavery sentiment at the North was demanding that the principles of 1787 and of the Missouri Compromise should be applied to the California country.<sup>2</sup>

The movement of population had been setting westward for many years, but the crest of the wave did not reach Iowa and Oregon until about 1840. Between these two regions was a vast unoccupied and unbroken wilderness. Iowa was free soil by the Missouri Compromise, but at the time that Compromise was made, the Oregon country was occupied jointly with Great Britain and it seemed impossible that it would be brought within the control of Congress during the century. The contest for its possession came to an end in 1842, and within three years immigrants were passing in increasing numbers into Oregon, chiefly from Missouri and the Southwest. It became necessary to give it a territorial government, and on the sixth of August, 1846, Stephen A. Douglas, of the House Committee on Territories, reported a bill organizing the Territory of Oregon. In Committee of the Whole, the anti-slavery clause from the ordinance of 1787, was added, but no further action was taken during the session. When Congress reassembled Douglas again reported his bill, but the anti-slavery amendment was voted down in Com-

<sup>1</sup> Vermont Resolutions of 1844; Virginia Resolutions, March 8, 1847; January 20, 1849.

<sup>2</sup> Pennsylvania Resolutions, January 22, 1847; see the Massachusetts Resolutions of April 23, 1838.

mittee of the Whole. Burt, a member from South Carolina,<sup>1</sup> promptly revived the amendment, because, as he said, the entire territory lay north of the Missouri Compromise line. His purpose was not so much to exclude slavery north of the line, as to legalize it south of it, and thus establish a precedent for future use. Texas had been "reannexed," but the South was not satisfied and its legislatures were demanding more slave territory. Burt's amendment, however, was rejected and Congress adjourned with Oregon still unorganized. When it reassembled in December, 1847, it was met by Polk's message<sup>2</sup> urging action on the Oregon question, but it still delayed, and not until the twenty-ninth of May, when the President sent a special message on the subject, did it set seriously to work to pass a territorial bill. On the second of August, by a sectional vote, the North against the South,<sup>3</sup> the bill was passed in the House with an anti-slavery provision. The Senate, on the tenth, struck out this provision, but the amendment originally proposed by Douglas was carried, by which the line of the Missouri Compromise was extended to the Pacific.<sup>4</sup> On the following day the House having rejected the Douglas amendment passed its own original bill, to which the Senate finally agreed, the principle of the ordinance of 1787, restricting slavery, was thus embodied in the organization of our first Territory on the Pacific.

With the creation of the Territory of Oregon, the entire national domain, excepting the California country, was given a civil organization. Oregon was eliminated

<sup>1</sup> December 15, 1846.

<sup>2</sup> December 7, 1847; Richardson, IV, 532.

<sup>3</sup> Yeas 128, nays 71.

<sup>4</sup> August 14, 1848; Statutes at Large, IX, 323. In the Senate 29 to 25 of negative votes from slave States.

from the slavery issue, and was considered by the slavocrats as an offset to California. They confidently expected to organize the entire California purchase as slave soil. The contest opened with the assertion by slave owners of their right to carry slave property into any part of the new country. The exercise of this right would transform it into slave soil, and compensate the South for its loss through the Missouri Compromise and the recent Oregon act. With the California country given over to slavery, with a strict execution of the fugitive slave act, and with a complete, and if necessary, enforced cessation of anti-slavery agitation, the pro-slavery people of the United States, North and South, thought that the country might have peace. No subject in American history has been so prolific a source of literature as slavery. Its aspects were innumerable; it touched American life at every point. With much that has been written that is true there has gone more which is false; and perhaps the consummation of falsity has been the emphasis of the causes which precipitated the final struggle, culminating unexpectedly in the abolition of slavery.

The contest in 1848, while differing from that of 1820, resembled it in many essential features, the contest over the rights of property. Slavery in America was a far more merciful institution than slavery in any form had been in any former time. Ill treatment of the slave at the South was the exception, but slavery is an evil thing, however kind the master may be, and moralists at the North found in it ample texts for sermonizing, a social condition that demanded reform. The essential difficulty was the law of the land: not only the Constitution of the United States and acts of Congress, but the State constitutions and the statutes. Nor were these all, for behind them lay public opinion, and public opinion was

against the negro, whether bond or free. The South in demanding protection of the right to carry its property into the territory believed that it was asking no more than did the North when it asked protection for its personal property, its chattels of various kinds with which its hardy immigrants moved into the new region north of Missouri. The laws of the country equally recognized the rights of property, whether of horses and plows at the North, or of negroes and plows at the South. Primarily, the question was economic and industrial, and the very fact that its solution was attempted through politics also made it one of the most dangerous questions which the people could face. At the South the issue was very clearly recognized as one of property,<sup>1</sup> an economic truth emphasized in Kentucky, Maryland and Virginia, in 1850.

He who would understand the causes of the rise and fall of slavery in America must devote himself to a study of its economic features, and though he will find less literature on this phase of the subject than he might be led to expect, he will be rewarded, if he pursues his investigation, with an opportunity of examining the sources of all our knowledge concerning slavery, and finally, with the discovery of the causes which were sooner or later to compel its abandonment. As soon as property in slaves became too insecure for profitable investment, the institution of slavery was doomed. After 1848, the contest nar-

<sup>1</sup> This was brought out very clearly in the Kentucky Constitutional Convention of 1849, for an account of which see my *Constitutional History of the American People, 1776-1850*, Vol. II, Chaps. I-VI. Essentially the same conclusions were reached in Maryland and Virginia about the same time; see the *Debates and Proceedings of the Maryland Convention*, November 4, 1850; May 13, 1851, 2 Vols., Annapolis, 1851; *Journals and Documents of the Virginia Convention*, October 14, 1850; August 1, 1851; Richmond, 1851.



rowed down to a supreme effort on the part of the slave holders to keep that form of property secure. They were beginning to doubt its profitableness. The census of 1840 plainly showed that the slave States were falling behind and ceasing to compete with the free States. While acknowledging this fact, Southern men denied that the conditions which it indicated were attributable to slavery. They preferred the social and economic condition of the South to that of the North. They did not desire immigration, nor those opportunities in life of which the North was wont to boast. The cry at the South was, "Let us alone, slavery and all;" at the North there was a propaganda for free institutions. Behind this spirit of reform was the stern face of nature, which forbade slavery. The line of the Missouri Compromise coincided approximately with that isothermal line, north of which slave labor could not be made profitable. The question was one not alone of morality, but of heat and cold. Had the frosts of New England overspread North Carolina and Texas the people of the South would have been anti-slavery. The economic struggle over slavery was one of morality, because primarily, one of climate. Had the United States never expanded beyond its original domain, slavery would never have become the gravest issue in its annals; it would have died of limitation.

The views of the South concerning slavery were shared by many people at the North, possibly by the majority in 1848. Oregon was far away and whether it was free soil or slave seemed of little moment to the majority of people pursuing their daily affairs in the older parts of the Union. But the majority had not yet awakened to the full meaning of the situation. The Oregon country was not a region in which slavery could be made profitable, and little was known of the country to the south of it.

Under Mexican law that country had been free soil; Texas had once been free soil, but in the twinkling of an eye had been transformed into slave soil. The opinion of the Virginia legislature, that Congress had no authority to exclude slavery from a territory or from a prospective territory, like the California country, was not shared by the people of the North. Accustomed to free institutions they naturally favored free expansion.

At this moment, while the boundaries of the acquisition from Mexico were yet undefined, just at the close of the Mexican war, the discovery of gold was announced from California, and it may be said to have changed the history of the United States. Europe at this time was convulsed by revolutions, and multitudes of people were turning their faces toward America. They were looking for homes for themselves and their posterity. Unaccustomed to slavery, though familiar with many forms of oppression, they naturally sought homes at the North. The feelings of the Southern people toward European immigrants were well known in the old country, and helped to shape the course of migration. By July, 1849, upward of two hundred thousand men, chiefly from the older States, but also many from Europe, were in California; a number sufficient to form a State. They petitioned for admission into the Union, but Congress ignored their request. It did not realize that a new State had suddenly emerged on the Pacific coast, with a population the most composite of any that had yet assembled in one community in America. But the people of California were in earnest. They comprised men of every profession and occupation, young and vigorous, the men to build a great State. In convention at Monterey, during the month of September, 1849, they proceeded to form a State constitution, which in due time was sent to Congress.

The attitude of the people of California toward slavery shows plainly the social character of the institution as a factor in the development of the United States. If the slave owner could bring his property into the mines and monopolize their riches, he could outstrip his less favored associates. The problem in California was to maintain equal economic opportunities for all, and these could not be maintained if slavery was permitted; therefore, though most of the people of California were hostile to the negro, bond or free,—and the debates in the Monterey convention sufficiently indicate this hostility,—they were compelled by economic conditions such as would be tolerated on the coast, to forbid slavery. Racial antipathy was so strong that the Monterey convention seriously discussed a proposition to exclude free persons of color from the State,<sup>1</sup> but this raised the old question of citizenship debated at the time of the Missouri Compromise, and it was feared that if the free negroes were forbidden the State, Congress might refuse to admit it into the Union, for at this time the representatives from the free States were in the majority in Congress, excepting, of course, in the Senate, in which there was an equal representation of free and slave States. California would break the balance of power, and this very fact would intensify the struggle over its admission.

Though there were thousands of Southern men in California, they recognized the impossibility of introducing slavery. A pro-slavery constitution, even if it passed the Monterey convention, was not likely to pass Congress. But public opinion on the coast was well settled that free persons of color should not be made welcome. It was unnecessary to declare this fact in the constitution. Nearly

<sup>1</sup> See my *Constitutional History of the American People, 1776-1850*, Vol. II, Chaps. X-XII.

half the California country, which included the entire area acquired from Mexico, extended below the line of the Missouri Compromise. By that agreement its northern and larger part was free soil, and the anti-slavery party in Congress and throughout the North was demanding, much to the alarm of the South, that the new admission should be a free State. If all that portion of the country north of the line was to be organized as free soil, taken together with the Oregon country and the region between Oregon and Iowa, it would more than balance the region which by the compromise might be organized as slave territory. If anti-slavery opinions were to rule, then the slave soil of the country would extend practically no further west than Texas, and thus limited would be in course of ultimate extinction. The thirty States of the Union in 1849, were half free and half slave soil. The free States sent one hundred and thirty-nine members to the House of Representatives, the slave ninety-one. The population of the free States was thirteen millions;<sup>1</sup> that of the slave States nine millions;<sup>2</sup> and of the million and a half of immigrants who had arrived in the country since 1840, nearly all had settled in the free States, though a few had gone to Louisiana.<sup>3</sup>

The tide of foreign immigration which overspread the North strengthened its industrial activities. We have spoken of the testimony which the census of 1840 bore to the increase of wealth at the North. That testimony should have alarmed and awakened the South, but though it was cited in Kentucky in 1849, it was rejected as alto-

<sup>1</sup> In 1850, 13, 599, 488.

<sup>2</sup> In 1850, 9, 663, 997.

<sup>3</sup> In Louisiana in 1850, the percentage of foreign born was 13.18; in California, 23.55; in Wisconsin, 36.18; in Kentucky, 3.2; in Tennessee, .56; in Massachusetts, 16.49; in Pennsylvania, 13.12; Census of 1890, Part 1, "Population" pp. LXX-LXXIV.

gether irrelevant. Among the startling comparisons which the census emphasized a few may be selected. The South exported about seventy-five millions (\$74,866,310) worth of cotton, rice and tobacco yearly; but the agricultural products of the State of New York, exceeded this aggregate by nearly thirty-three million dollars, (\$108,275,281). The free States manufactured articles to the value of one hundred and ninety-seven millions annually (\$197,658,400), but the slave States to the value of only about one-fifth as much (\$42,178,184). The aggregate annual earnings of the slave States were four hundred millions (\$403,429,718); that of the free States six hundred and fifty millions (\$658,705,108). The difference was less striking when the two sections were compared as a whole than in the case of individual States. The yearly value of the productions of the State of New York was greater by over four millions, than the aggregate income for the same time of the Carolinas, Georgia, Alabama, Mississippi and Louisiana. The small county of Essex in Massachusetts, with a population of ninety-five thousand, produced yearly as much as the entire State of South Carolina, with a population of nearly five hundred and fifty thousand.

Striking as were these contrasts in material strength, the contrast in higher forms of wealth was more startling. The primary schools in the slave-holding States enrolled two hundred thousand pupils (201,085); but such schools in the free States enrolled nearly eight times as many (1,626,028). The pupils in these schools in the State of Ohio alone outnumbered by nearly eighteen thousand the enrollment in all the slave States. Southern high schools were attended by thirty-six thousand scholars (35,935). The Northern high schools by four hundred and thirty thousand (432,388). The attendance in these

schools in the smallest free State, Rhode Island, exceeded by a thousand pupils the attendance in the largest slave State, Virginia, and these schools in Massachusetts enrolled nearly four times as many students as were enrolled in all such schools in the slave States. The schools and colleges at the North were attended by more than two million persons (2,213,444); those at the South by less than one-sixth as many (301,172). It must be remembered, however, that the population of the free States was twice as great as that of the slave-holding, but even this disparity in numbers could not explain the neglect of education. That was explicable by the presence of the slaves, who constituted nearly one-half the Southern population and were rigorously excluded from school privileges. One effect of the neglect of education at the South by the white race was shown in the prevalence of illiteracy. One person out of every ten of the white population at the South could neither read nor write; at the North the proportion was one to one hundred and fifty-six.

These facts and many others which the census disclosed were freely talked about at the South;<sup>1</sup> and the census which yielded them had been taken nearly ten years before. Presumptively, therefore, the census of 1850 would show even a more startling contrast. These economic conditions between the two sections were not familiar knowledge to the country; few took the trouble to investigate the census. But the leaders of the people knew the facts and sought to compromise the different interests and activi-

<sup>1</sup> The lessons of the census of 1840, were the subject of Theodore Parker's letter to the People of the United States Touching the Matter of Slavery; Boston, James Monroe and Company, MDCCCXLVIII; 120 pages,—a pamphlet written with great power and destined to wide influence. Parker's letter was carefully discussed in the Constitutional Convention of Kentucky of 1849; see its Debates and Proceedings, 870, et seq.

ties which produced them. Clearly, if a lasting compromise was to be made, it must rest upon a true economic basis, and it was doubtful whether such a basis would support a compromise.

When Congress met in December, 1849, there was a widespread understanding in the country, that a compromise of some kind would be attempted. There had been a serious effort three years before in Congress to exclude slavery from the entire California country. David Wilmot, a representative from Pennsylvania, on the eighth of August, 1846, had proposed that an anti-slavery proviso should be added to the bill appropriating two million dollars for the purpose of conducting peace negotiations with Mexico.<sup>1</sup> He proposed to exclude slavery forever from the soil acquired from Mexico, and in Committee of the Whole, his proposition was carried by a vote of eighty-three to sixty-four. It is believed that the proviso would have succeeded in the Senate, had not Davis, of Massachusetts, persisted in delivering a long and untimely speech on the subject, in the midst of which Congress adjourned, and the opportunity for passing the Wilmot proviso was forever lost. All efforts in the next Congress to revive it failed. The pro-slavery men pronounced it a plain violation of the Constitution, and the Whigs as a party inclined to the same view. Calhoun, the leader of the slavocrats demanded the enactment of a law declaring that the Constitution and laws of the United States applicable to a territory were extended over the Mexican purchase.<sup>2</sup> This would have made it slave soil. The principle of the Wilmot proviso and that of Calhoun's proposition seemed irreconcilable, but they were

<sup>1</sup> See Polk's Message, August 8, 1846; Richardson, IV, 569: Benton's Debates, XV, 646, et seq., XVI, 54, et seq.

<sup>2</sup> Calhoun's Works, IV, 346, 498.

the elements out of which a compromise must be constructed.

On the twenty-ninth of January, 1850, Henry Clay, in the Senate, offered eight resolutions covering, he said, all points in controversy and adjusting them upon a fair and equitable basis. He proposed to admit California as a free State; to organize Utah and New Mexico as Territories without mention of slavery; to purchase a portion of the State of Texas and attach it to New Mexico, and for compensation assume the public debt of Texas contracted before its annexation; to abolish the slave trade, but not slavery within the District of Columbia; and to enact a more effective fugitive slave law than that of 1793, but to leave the trade between the slave-holding States wholly under their control.<sup>1</sup> The support of Webster and the lesser Whig leaders was secured and both Houses, it was supposed, would be willing to concede to the pacific purpose and practical wisdom of the proposed compromise. In support of it Clay delivered a powerful speech,<sup>2</sup> in which he took up each resolution, showing its scope, purpose and, as he believed, its inevitable pacific effect.

The heterogeneous resolutions were reported in one bill in May, but it was speedily discovered that there were so many elements of discord in it as to make its passage impossible. The debate ran on through the summer, and the propositions were finally taken up separately and passed. Every prominent member in both branches of Congress spoke on the resolutions; but their constitutional elements were best interpreted in three great speeches by Calhoun, Webster and Seward.

Calhoun opposed Clay's resolutions and prepared a

<sup>1</sup> Benton's Debates, XVI. 386.

<sup>2</sup> February 5, 1850.



speech to prove their inexpediency and unconstitutionality. When the time came for its delivery, he was sick in bed, but by a characteristic exercise of will power took his seat in the Senate and listened to the reading of his speech by Senator Wilson, of Virginia. Its opening thought indicated the major premise of his argument, that the agitation of the subject of slavery if not prevented soon and effectively would end in the disruption of the Union. The public discontent had not originated with demagogues or disappointed politicians, its cause would be found in the conviction of the Southern people, that they could no longer remain in the Union, if the existing state of affairs was suffered to run on. The primary cause was the destruction of the equilibrium between the two sections of the government. The North now had a majority of votes in the electoral college and in the House of Representatives. It had a majority of the population and would soon have a majority of the States; California, Oregon and Minnesota were in prospect, but not a single State at the South. The time was at hand when there would be twenty Northern to twelve Southern States, with forty Northern and twenty-four Southern Senators. The destruction of the old equilibrium between the sections was attributable to the legislation of the general government. It had begun, he said, in a series of acts excluding the South from the common territory. It had been continued by the adoption of a revenue system, by which, said Calhoun, an undue proportion of the burden of taxation had been imposed upon the South, and an undue proportion of its proceeds appropriated to the North.

The first act which deprived the South of its share of the territories was the ordinance of 1787, which had entirely excluded it from the northwest territory. The next

was the Missouri Compromise, which excluded it from that portion of the Louisiana acquisition lying north of  $36^{\circ} 30'$ , excepting the State of Missouri, a compromise which meant more than one-half the acquisition. The last act had excluded the South from the territory of Oregon. Originally this vast region, comprising more than twelve hundred thousand square miles, from which the South had been excluded, was slave soil, and belonged of right as much to the South as to the North. The entire region left open to the South comprised Missouri, Florida, Texas and a portion of the Louisiana purchase south of  $36^{\circ} 30'$ , comprised only six hundred and nine thousand square miles. A large portion of Texas was yet in controversy and the area open to slavery might thus be decreased. If the North was not successful in wresting this portion of Texas from the South it would have appropriated to itself more than one million seven hundred and sixty-four thousand square miles, and the South would be excluded from nearly three-fourths of the entire acquisition to the national domain. It was this acquisition that had destroyed the old equilibrium between the sections. Had it not been for discriminating legislation embodied in the ordinance of 1787, the Missouri Compromise and the Oregon act, Calhoun affirmed, that the South would undoubtedly have divided immigration with the North, and would have maintained an equality in population. She would thus have been able to cast enough votes to retain her equal rights in the territories and the old equilibrium would not have been broken. The protective system which the North had put in effect had increased the protective capacity of the North and attracted emigration from all parts of the world, an explanation, he said, of the greater population found in the free States. But a third cause must be added, the

gradual transformation of the government "from a Federal Republic into a great national consolidated Democracy."

The North having acquired an absolute control over the government sacrificed Southern interests. Here Calhoun referred to the slaves who, he declared, constituted a vital portion of the social organization of the South. The enemies of slavery regarded it as a sin, and many Northern men believing that they were in some way implicated in the sin, felt responsible for suppressing it by every power within their means. Others regarded it as a crime. At the South, on the contrary, it was believed that the relation between master and slave could not be destroyed without subjecting the two races to the greatest calamity and impoverishing the section, therefore, the Southern people felt bound to defend it in every way. Hostility to slavery had taken the form of an organized movement in 1835, when societies were founded, presses established and lecturers sent forth to excite the Northern people against the institution. Incendiary publications were scattered throughout the South, through the mails for the purpose of provoking servile insurrection. The South was alarmed and aroused and compelled to enter upon its own protection. The agitation was not abated. Petitions were poured in from the North upon Congress to abolish slavery in the District of Columbia; to prohibit the inter-state slave trade, and, mingled with these petitions, was the unconcealed announcement of the ultimate purpose of their authors to bring about the abolition of slavery throughout the Union. Calhoun reminded the Senate that in 1833 he had warned Congress against receiving these petitions, and that had his voice been heeded, the fanatical zeal of the abolitionists might have been ex-

tinguished.<sup>1</sup> "That," said he, "was the time for the North to show her devotion to the Union."

But abolitionism had increased, Northern legislatures had passed acts which in effect abrogated the provisions of the Constitution respecting the delivery of fugitive slaves, and the agitation had culminated in the demand of the North, that Congress should henceforth exclude slavery from the territories and admit no more slave States. All these agitations had weakened the cords of Union, and every act and resolution of Congress, which had suffered the agitation to continue only hastened the overthrow of the Union. The extremes were disunion or the submission of the Southern people. Clay's proposition, Calhoun believed would only add fuel to the fires already kindled. His plan could not save the Union. The principle of the Wilmot proviso was exclusion of the South from all territory acquired by the Mexican treaty, and at this point Calhoun referred to the solemn resolutions of the Southern legislatures, announcing that the South would unite to resist the adoption of that principle. The principle of the proviso could not be found in the Constitution, for it claimed for Congress an unlimited power over the territories, a claim which the Southern States held to be unjust and unconstitutional.

Calhoun combated the idea that the inhabitants of a territory had the inherent right of self-government belonging to the inhabitants of a State, and he characterized the late conduct of the people of California, in forming a constitution and a State government, and appointing Senators and Representatives, as "the first fruit of this monstrous assumption." Had California been a sovereign and independent State its people would have had the right to establish whatever government they pleased, but the

<sup>1</sup> See page 413, ante.

United States had conquered California, and sovereignty over the country was vested in the general government and not in individuals, who, without its consent had lately attempted to form a constitution and set up a State government. Calhoun's contention was, that sovereignty over the territories was vested in the United States, and that the power of legislating for them was expressly vested in Congress, therefore, Clay's first resolution to recognize California as a State was calculated to lead to most dangerous consequences; it would recognize a revolutionary and rebellious act as a constitutional procedure.

The same defect characterized the remaining resolutions. The South did not ask for compromise, she demanded only the Constitution. She had surrendered much, she had little left. Satisfy her that she could remain honorably and safely in the Union and the questions at issue would be forever settled. This was easy to do. "The North," concluded he, "has only to will it to accomplish it; to do justice by conceding to the South an equal right in the acquired territory, and to do her duty by causing the stipulation relative to fugitive slaves to be faithfully fulfilled, to cease the agitation of the slave question, and to provide for the insertion of a provision in the Constitution, by an amendment, which would restore to the South in substance, the power she possessed of protecting herself before the equilibrium between the sections was destroyed by the action of the government." In this, almost the last public utterance of the great Expounder of State Sovereignty, is to be found the basis of political operations which the South pursued for the next ten years. It was accepted by slavocracy as the conclusion of the whole matter; to the radical wing of the slavocrats it became a declaration of Southern independence, and the constitutional principles which it laid down were incor-

porated ten years later in the formation of the Southern Confederacy.<sup>1</sup>

Three days later, Webster discussed the great issue of the hour in his famous Seventh of March speech.<sup>2</sup> His attitude toward the compromise was not exactly known. Thirty years before he had changed his opinions on the tariff; would he now change his opinions on the Constitution? In reply to Hayne, he had given voice to the popular sentiment of nationality. Would he now raise his voice for freedom? He spoke, he said, for the preservation of the Union, not as a Northern man, but as an American. Like Calhoun, he made a swift review of the history of the country, but he found the first and principal cause of discord in the act of the California convention prohibiting slavery. The war had been waged for the sole purpose of acquiring more slave territory, and as the California country,—here Webster's geography was sadly at fault,—lay mostly South of the United States in a warm climate, it was naturally expected by the South, he said, that the acquisition in that region would become slave soil. But events had taken an unexpected turn; California and New Mexico were likely to come into the Union as free States, and the petition of California had revived the whole slavery question. For this reason, Webster found the apple of discord in the free soil clause of the California constitution.

Slavery, he said, had existed in the world for ages. The Founder of Christianity and His disciples had not pronounced against it. But the North, though unable to find a direct prohibition of it in the New Testament, had pronounced it wrong, and indeed, had identified anti-slavery sentiments with religion. In the South, on the

<sup>1</sup> March 4, 1850; Calhoun's Works, IV, 524.

<sup>2</sup> Works, V, 324.

contrary, where slavery prevailed, and there were thousands of religious men with consciences as tender as any of their brethren at the North, the institution was not considered unlawful. Taking up the prevailing objections to slavery, he attempted to answer all of them, and he dwelt at length upon the pro-slavery compromises of the Constitution. The intention of the Fathers, he said, was to leave slavery where they found it, entirely under the control of the States themselves, and with this understanding the Constitution had been adopted. It was the States which had agreed to the ordinance of 1787. The several acquisitions of territory down to the annexation of Texas had successively changed the aspect of the slavery question, but the most important change had been effected by the admission of Texas. From the moment of its annexation the whole country to the western boundary of Texas was pledged forever to be slave property. In Webster's opinion there was not within the United States or any of its territories a single foot of land, the character of which in so far as being free or slave soil, was not fixed by some irrevocable law beyond the power of the general government.

By the terms of its admission, the vast domain of Texas might be subdivided into four slave States, for it lay South of the Missouri Compromise line; and Texas had been obtained, said he, "for the security of the slave interest of the South;" a statement to which Calhoun promptly demurred. After the acquisition of New Mexico and California, many Northern Democrats had voted to extend the Wilmot proviso over them and had returned to their constituents to make political capital out of their conduct, crying free soil and no slavery. In thus attacking the free soilers it was Webster's purpose to create a doubt in the public mind, of their integrity and con-

sistency, and thus help undermine their cause. As the Wilmot proviso would recognize slavery south of the compromise line, its supporters might be accused of giving their votes in favor of perpetuating slavery.

Webster had always opposed expansion, but Texas had been joined to the Union by Democratic votes, and there remained only one honorable course, to carry out the purchase and contracts created with it at the time of its admission. These called for slave States; but the law which sanctioned slavery in Texas did not apply to California and New Mexico, that, said he, "is the law of nature, of physical geography, of the formation of the earth" settling forever "with a strength beyond all dream of human enactment that slavery cannot exist in California or New Mexico." But by slavery he did not mean the institution as it existed at the South. The law of nature did not prevent penal servitude. The peonism familiar to Mexican law, a form of servitude which lingered longest in the United States.<sup>1</sup> Webster had a strange idea of the California country. In his imagination it seemed strongly to have resembled the wildly mountainous regions of Asia. By no possibility, said he, could anybody be induced to go into New Mexico with slaves. California was in much the same condition. Thus, the two regions were destined to be free "by the arrangement of things ordained by the power above us." And he declared that in the territorial bill for New Mexico before the Senate he would not vote to insert any prohibition whatever on slavery; he would "not take pains uselessly to reform an ordinance of nature, nor to re-enact the will of God, and would put in no Wilmot proviso for the mere purpose of a taint of a reproach." Thus far Webster's defense of

<sup>1</sup> For an account of its abolition in Texas and New Mexico, see Vol. III.



the Constitution and the Union was practically a defense of slavery.

He then took up the grievances of the South against the North,—and they had been cited by Calhoun and in each instance found the North guilty. For its personal liberty laws, its anti-slavery agitation, its violation in the spirit of the compromise respecting slavery, he could make no defense. But there were complaints of the North against the South of which the principal was the arrest of free persons of color as fugitive slaves. Offenses, he said, irritating, exceedingly unjustifiable and oppressive; but he did not examine the grievances of the North as he did those of the South nor blame the South as he did the North. His apology was chiefly for slavery.

Unlike Calhoun, he found in Clay's resolutions a compromise of peace for the country. Unless some compromise was made disunion seemed impending, and secession, peaceable secession, said Webster, would be an utter impossibility. As in his reply to Hayne nearly twenty years before he closed with an eloquent appeal for liberty, the Constitution and the preservation of the Union. But the defender of the Constitution had become the defender of slavery.

On the day before Webster's speech, the Mississippi legislature passed a joint resolution which plainly indicated the state of public sentiment at the South. California and other regions acquired from Mexico should be given territorial government by Congress, and all citizens of the United States residing in them, or removing to them, should be protected in their civil and political rights. The failure of Congress to provide laws for the government of California and to protect equally all citizens of the United States removing to it with their property, so ran these resolutions, was in the highest de-

gree unjust toward the people of the slave-holding States, because it deterred them from going to California with their slaves, and was intended to deprive them of an equal share of the property of the Union. The course which Congress had pursued in refusing to provide a territorial government for California had been manifestly for the purpose of promoting the objects of the abolitionists. To admit California into the Union as a sovereign State with a free soil constitution would be a fraud on the right of the slave-holding States. The legislature, therefore, instructed the Senators and Representatives of the State to resist the admission of California by all constitutional means.<sup>1</sup> Other resolutions from other Southern legislatures emphasized State sovereignty, denied the power of Congress to legislate as to slavery, attacked the principle of the Wilmot proviso and supported the doctrines which Calhoun had so often and so effectively laid down. There was a general movement at the South for a convention of the slave-holding States to consider the question of defending Southern rights, and Calhoun was secretly urging for one to assemble at Nashville, early in June. Clay's opening speech for the compromise; Webster's apology for slavery and Calhoun's philippics against the compromise each had a backward look. The new Democracy found an advocate in William H. Seward, of New York, who, on the eleventh of March, delivered an epoch-making speech against the compromise.<sup>2</sup>

Seward looked to the future; Webster, Clay and Calhoun, were children when the Constitution was adopted. They grew up under the shadow of the Fathers and advo-

<sup>1</sup> Mississippi Resolutions on California, March 5, 1850; on Federal Relations, March 6, 1850, in the State Laws.

<sup>2</sup> It is indexed "Remarks on California, the Union and Freedom;" in the Appendix of the Congressional Globe, Vol. XXII, Part 1, First Session, Thirty-first Congress, 26-269.

cated compromise of some kind throughout their political career. Of the three statesmen, Calhoun was the most independent and from his stand, the most logical. He cannot truly be described as a compromiser, excepting as he clung to the compromise which the fathers had inserted in the Constitution. Seward realized that the period for compromises was past. His speech on California, the Union and freedom, was the first great utterance of perennial interest in our annals, which pointed the way our civil affairs were going. To the people of the free States his appeal was as persuasive as Calhoun's fourth of March speech was to the people of the South. Tested by time, the idea which Seward advocated proved to be the foundation of a new national policy.

He began by saying that California was already a State, richer and more populous than several of the thirty already in the Union. He answered the objections which had been advanced to its admission, showing that it had followed precedent in assigning its own boundaries, in prescribing electoral qualification, in forming a constitution and in asking for admission without having passed through the probationary territorial period. But there were positive reasons for its admission of which the most important was the movement of population from the Atlantic to the Pacific. The law of migration had made California a State. Premising that the population of the Nation, at the time he spoke, was twenty-two millions,<sup>1</sup> he prophesied with wonderful accuracy that in ten years it would be thirty millions,<sup>2</sup> in twenty years, thirty-eight millions,<sup>3</sup> in thirty years fifty millions,<sup>4</sup> in forty years sixty-four millions,<sup>5</sup> in fifty years eighty millions and in a

<sup>1</sup> In 1850, 23, 191, 876.

<sup>2</sup> In 1860, 31, 443, 221.

<sup>3</sup> In 1870, 38, 555, 371.

<sup>4</sup> In 1880, 50, 155, 783.

<sup>5</sup> In 1890, 62, 622, 250.

century two hundred millions. By the middle of the twentieth century the population of the United States would equal one-fourth the population of the globe at the time Seward spoke, and would be double the population of Europe at the time of the discovery of America. The increase of population on the Pacific coast, Seward asserted, would far exceed what it had been on the Atlantic. Immigration was already outstripping all calculations. The silver and gold hidden in the mountains and ravines of California was drawing hither a multitude from all quarters of the earth. The barren hills of New England and New York might delay, but could not prevent the great popular movement. At the time Seward spoke there was scarcely a settlement of whites to be found between the eastern counties of Iowa and the gold mines of California. But he foresaw the expansion of the vast intervening region and prophesied that it would soon be brought "into social maturity and complete political organization."

The great question was whether "this one great people, having a common origin, a common language, common sentiments, interests, sympathies and hopes" should remain "one political State, one Nation, one republic, or be broken into two conflicting and probably hostile nations or republics." The center of political power must rest in the agricultural interests and masses occupying the interior of the continent. If they could not command access to both oceans, they would secure the approaches of the one which afforded the greatest facilities for their commerce. They would not permit the avenues to the markets of the world to be cut off. But the position, power and capabilities of the American people were sufficient to maintain the Union. The United States included regions of varying climates and productions and

possessed unparalleled natural advantages for transportation and commerce. A democratic federal government preserving local freedom and a common central elective agency for the regulation of common interests, domestic and foreign had been successfully established and organized. The Atlantic States, through their commercial, social and political affinities, were steadily modifying the governments and social institutions of Europe and Africa, and the Pacific States, the States of the future, must necessarily perform the same sublime and beneficent functions in Asia. This was American expansion of the highest order. If the people remained an undivided nation, the civilization which they set up would ultimately bless the whole earth.

It was at the threshold of a magnificent opportunity that the American people stood, in 1850. The first aspect of that opportunity was the rise of California, a fully appointed State. Whether she should become a part of the Union would depend on Congress, for she would not abide delay; not that she contemplated independence, but if she was rejected she had ample title to a vast estate and inexhaustible resources, and she could set her own terms for joining the republic. Her isolation was an element of her strength. Armies could not reach her by sea or land, and should our navy succeed in doubling the Cape of Storms, and ultimately catching sight of her great harbor, she had only to open her mines to seduce her enemies and utilize them in her own defense. Oregon undoubtedly allied with her was loosely attached to the Union, and would go with her and the entire Pacific coast would be lost to the United States. "Commerce," said Seward, "is the god of boundaries, and no man now living can tell his ultimate decree."

Turning then to Clay's compromise, he pronounced it

radically wrong and essentially vicious. It involved the surrender of the exercise of judgment and conscience on distinct and separate questions and relinquished the right to reconsider in the future the decisions of the present on questions prematurely anticipated. California was already free soil, why then demand as an equivalent a recognition of the claim to perpetual slavery in the District of Columbia? It must come in as a free State whether slavery should stand or fall in the District of Columbia, in New Mexico or in the slave States. Even if she had come with a pro-slavery constitution, Seward, much as he hated slavery, would vote for her admission; but he explained that he would not vote for her admission as a slave State unless for the purpose of preventing the dismemberment of the Union.

Calhoun had said that nothing would satisfy the slave States but a compromise which would convince them they could remain in the Union consistently with their honor and safety. Seward interpreted this as meaning, that though the free States had the larger population and majorities in both Houses of Congress, yet they were to concede to the slave States, which were in the minority in both population and representation, the unequal advantage of an equality. In other words, the government was to be converted from a national democracy into a federal alliance in which the minority should control the majority, which would be nothing less than to return to the original articles of confederation. The free States had long acquiesced in the nearly unbroken ascendancy of the slave States, because this result had happened under the Constitution, but they too, had honor and interests to preserve. Political equilibrium, of which Calhoun had said so much, requires, observed Seward, a physical equilibrium as its basis and was valueless without it. A

physical equilibrium between the free and slave States implied an equality of territory or some near approximate of equality, and this was already lost. But it required more than this, an equality in the number of slaves and freemen, and this relation must be perpetual. The census of 1840 disclosed a slave basis in the country of two and a half millions persons, but a free basis of fourteen and a half millions. The slave population increased twenty-five per cent every decade. But during the same time the free population had increased thirty-eight per cent. The movement of the free population into the territories was every day increasing the difficulty of forcing slavery into the new regions. Moreover, even if slavery could be enforced upon them, the African slave trade was prohibited and the domestic increase was not sufficient to supply reinforcements to the slave States of the future which would be expected to maintain the equilibrium.

Calhoun had claimed that the theory of political equilibrium had once been realized but it had been lost in 1787. If restored, said Seward, it would be lost again and more rapidly than before. The increase of the free population was constantly accelerated by new tides from South America, Europe and Asia, while the increase of slaves was retarded by inevitable emancipation. And he quoted Montesquieu's dictum, that nothing reduces a man so low as always to see freemen and not to be free, and that persons in that condition are the natural enemies to the State and dangerous if too numerous. Slavery in America was doomed to extinction.

His next objection to the compromise was that it could not prove successful; for instance, one detail proposed changes in the fugitive slave law. Not content with the provision in the Constitution on the subject of fugitive slaves, the slave-holding States had induced legislation

by Congress, but the Supreme Court had decided that the whole subject was not in the province of Congress and exclusively State authority.<sup>1</sup> Indeed, the Court decided that slaves were to be regarded as persons not merely to be claimed, but as property and chattels seizable without any legal authority or claim. Thus the original compact in the Constitution had been subverted by the procurement of the slave States themselves. With what reason then could they expect the free States of their own accord to reassume the obligation from which they had caused these States to be discharged; and Seward speedily attacked the fugitive slave acts as a violation of fundamental rights, and referring to the complaints against the North, of which Webster made so much, he did not hesitate to declare, that there had been even greater faults on the other side. He considered that the principle of the fugitive slave law, as it had been expounded, was unjust, unconstitutional and immoral. The consciences of the Northern people condemned it and no government had ever succeeded in changing the moral convictions of its subjects by force. The principle for which he contended was the law of nature and of nations; that the extradition of a fugitive from justice rests in a voluntary compact.

Clay had characterized his resolution providing for the continuance of slavery in the District of Columbia, as a peace bill, which Seward declared the people of the North could not grant. While they were equally responsible with those of the South for the existence of slavery in the District of Columbia, the fault was one wholly of common legislation. The express power of Congress to legislate in all cases over the District was absolute, and

<sup>1</sup> *Prigg vs. Pennsylvania*, 16 Peters, 539: see the dissenting opinions. A brief account of the case is given in the next Chapter.



Seward would not defeat it by consenting to a law which would forbid Congress to abolish slavery there. The same principle applied to the territories.

He took issue with Webster as to the obligation of Congress to admit four new slave States to be formed out of Texas. The question was not quite so simple as Webster had presented. The States once formed, had the right to come in free or slave, according to their own choice. But Seward held, they could not be formed at all without the consent of Congress, and Congress was not obliged to give its consent. As he could find no authority in the Constitution for the annexation of foreign territory by a resolution of Congress, and no power adequate to that purpose but the treaty making power of the President and the Senate, he insisted that the constitutionality of the annexation of Texas itself should be cleared up before he could agree to the admission of any new States which might be formed within it; and he gave notice that he would vote to admit no more slave States, unless under circumstances absolutely compulsory and no such case, he said, was now foreseen. Calhoun had rested his argument on the original equality of the States and the common property rights of each State in the acquisitions since 1789. Seward questioned the accuracy of this statement. It rested, he said, on a syllogism of Vattel, that all men are equal by the law of nature and of nations, but, added Seward, as States are only lawful aggregations of individual men, who severally are equal, therefore, they are equal in natural rights. By Vattel's dictum, the right of property in slaves would fall to the ground, for one who was equal to another could not be an owner of property in that other. But Calhoun would answer, that the Constitution recognized property in slaves. It would be sufficient, said Seward, to reply, that this constitutional recognition

must be void because repugnant to the law of nature and of nations. But Seward took a bolder stand than this and denied that the Constitution recognized property in man. Not only did it not affirm that principle, but on the contrary altogether excluded it. Citing from Jay, in the *Federalist*, and from the debates in the convention of 1787,<sup>1</sup> he concluded that the slave was divested of only two-fifths of a man, "leaving still three-fifths; leaving the slave still an inhabitant, a person, a living, breathing, moving, reasoning, immortal man." The Constitution, therefore, did not recognize property in man, but left that question as between the States, to the law of nature and of nations.

The right to have a slave implied the right in some one to make the slave, a right which must be equal and mutual, and which would resolve society into a state of perpetual war. But granting the constitutional recognition of slaves as property and the original equality of the States, Seward declared, that Calhoun's argument failed; the States were not a party to the Constitution as States, for the Constitution is of the people of the United States. But even if a party to it as States, they surrender their equality as States and submit themselves to the sway of the numerical majority on the two important qualifications; first, slave representation, and secondly, equal representation of the States in the Senate, the classification of the States into slave and free, or Northern and Southern, was purely imaginary, and the idea of a joint stock association or co-partnership in the Union was erroneous. "The United States," said he, "was a political state or organized society whose end is government for the security, welfare and happiness of all who live under its protection."

<sup>1</sup> Those of August 28 and 29, 1787.

Seward further objected to the compromise, because it assumed that slavery, if not the only institution in a slave State, was at least a ruling institution. On the contrary, slavery was only one of many institutions in a State. Freedom was equally an institution. Slavery was only temporary, accidental, partial and incongruous, but freedom was perpetual, organic, universal, in harmony with the Constitution itself. Clay's proposed compromise regarded the national domain only as a possession to be enjoyed by the citizens of the old States, either in common or by petition; but in truth they held no arbitrary power over it, they were only stewards. "The Constitution," said he, "devotes the domain to union, to justice, to defense, to welfare and to liberty." But it was his next declaration which most astounded many of his listeners, and which opened up a new political vista. "There is a higher law than the Constitution, which regulates our authority over the domain. The territory is a part, but no inconsiderable part, of the common heritage of mankind bestowed upon them by the Creator of the Universe. We are His stewards and must so discharge our trust as to secure in the highest attainable degree their happiness. And now, the simple, bold and awful question which presents itself to us is this: Shall we, who are founding institutions, social and political, for countless millions, shall we, who know by experience the wise and the just and are free to choose them and to reject the erroneous and unjust, shall we establish human bondage, or permit it by our sufferance to be established?" The same question had come up when the Fathers were establishing the organic law under which the States of the northwest were to come into the Union, and they had solemnly repudiated slavery from those States forever.

He then took up the principal argument which had been

advanced in defense of the compromise, and held that Congress had power to legislate on the subject of slavery within the territories; that it was necessary for the general welfare to exclude it; that it was not climate or any natural necessity, but the indolence of mankind which demanded slavery. Its evils would be increased not diminished by its diffusion. The fierce conflict of parties over the slavery question was no proof, he said, that the proposed compromise would restore harmony, the question was essentially one of morals. To the ominous threat of secession, if the demands of the South were not granted, Seward made reply, that the question of dissolving the Union was too complex, embracing the fearful issue whether the Union should stand, and slavery under the steady, peaceful action of moral, social and political causes, be removed by gradual voluntary effort and with compensation, or whether the Union should be dissolved and civil war ensue, "bringing on violent but complete and immediate emancipation." The stage of National progress had been reached when the crisis could be foreseen. Nothing was heard but slavery. All the public embarrassments arose from the want of moral courage to meet the question of emancipation. Because slavery had always existed,—and here Seward parted company with both the old parties,—he was convinced that slavery must give way "to the salutary instructions of economy and to the ripening influences of humanity." He considered emancipation inevitable and near. It might be hastened or hindered. All measures which fortified slavery or extended it, tended to its violent end, but all that checked its extension, tended to its peaceful extirpation. Seward advocated only lawful, constitutional and peaceful means to secure even that end, but the change could not go on too fast, if the only alternative would be a war of

racers. So long as slavery possesses the cotton fields, the sugar fields and the rice fields of the world, so long would commerce and capital yield it toleration and sympathy. Emancipation would be a Democratic revolution.

Seward's political philosophy is easy to understand. He looked to the recently new States of the West, and to the new States yet to be there, for the guarantees of freedom. The fate of the Union would depend upon the people of the West. Even if the Union were destroyed it would rise again in all its just and magnificent proportions. For the vindication of his beliefs, Seward looked not to the verdict of the passing hour, but to the countless generations who should inhabit the new regions of the American continent. Freedom was national. He had sounded the key-note to the new Democracy. One expression in Seward's speech immediately gave it a name and standing among the people; his appeal to the higher law, that corrective in nature, which not understood is supposed to rule the affairs of this world ultimately for justice. The speech is unquestionably the most important spoken on the compromise, and may be studied with care as containing the program of a new political party, whose interpretation of the Constitution was to utilize the doctrine of the higher law.

On the eighteenth of April, Clay's resolutions and some others which had been introduced during the debate were referred to a Select Committee, chosen on the following day. Clay was made its chairman. On the eighth of May he reported seven resolutions, all of which had received the support of a majority of the committee, but no two of which had received an equal support. During the next six weeks the committee's report, by successive amendments, was almost entirely divested of its original features, and it became evident that the "omnibus bill," as it was somewhat

derisively styled, could not pass. The most important speech in its favor was made by Clay on the twenty-second of July, which he was not unwilling should be considered the most important effort of his life.<sup>1</sup> His most important utterance was not so much in defense of the bill as of loyalty to the Union. Expressions of disunion sentiments were becoming familiar, nor were they confined to South Carolina. Clay's position no man could misunderstand. "I owe a paramount allegiance to the whole Union, a subordinate one to my own State. When my State is right, when it has cause for resistance, when tyranny and wrong and oppression insufferable arises, I will then share her fortunes, but if she summons me to the battlefield or to support her in any cause which is unjust against the Union, never, never will I engage with her in such a cause."<sup>2</sup> Between the ninth of August and the twentieth of September, the Compromise was agreed to in five separate bills.<sup>3</sup>

It continued the Missouri line of  $36^{\circ} 30'$  and by admitting California as a free State, and abolishing the slave trade but not slavery in the District of Columbia, and in organizing the territories of New Mexico and Utah without mention of slavery, but leaving its existence to be determined by the people when they might form a State constitution, there was a distinct gain for freedom. The Compromise left the greater part of the national do-

<sup>1</sup> It will be remembered that this speech was one of those consulted by Mr. Lincoln while preparing his first inaugural; see note, p. 396.

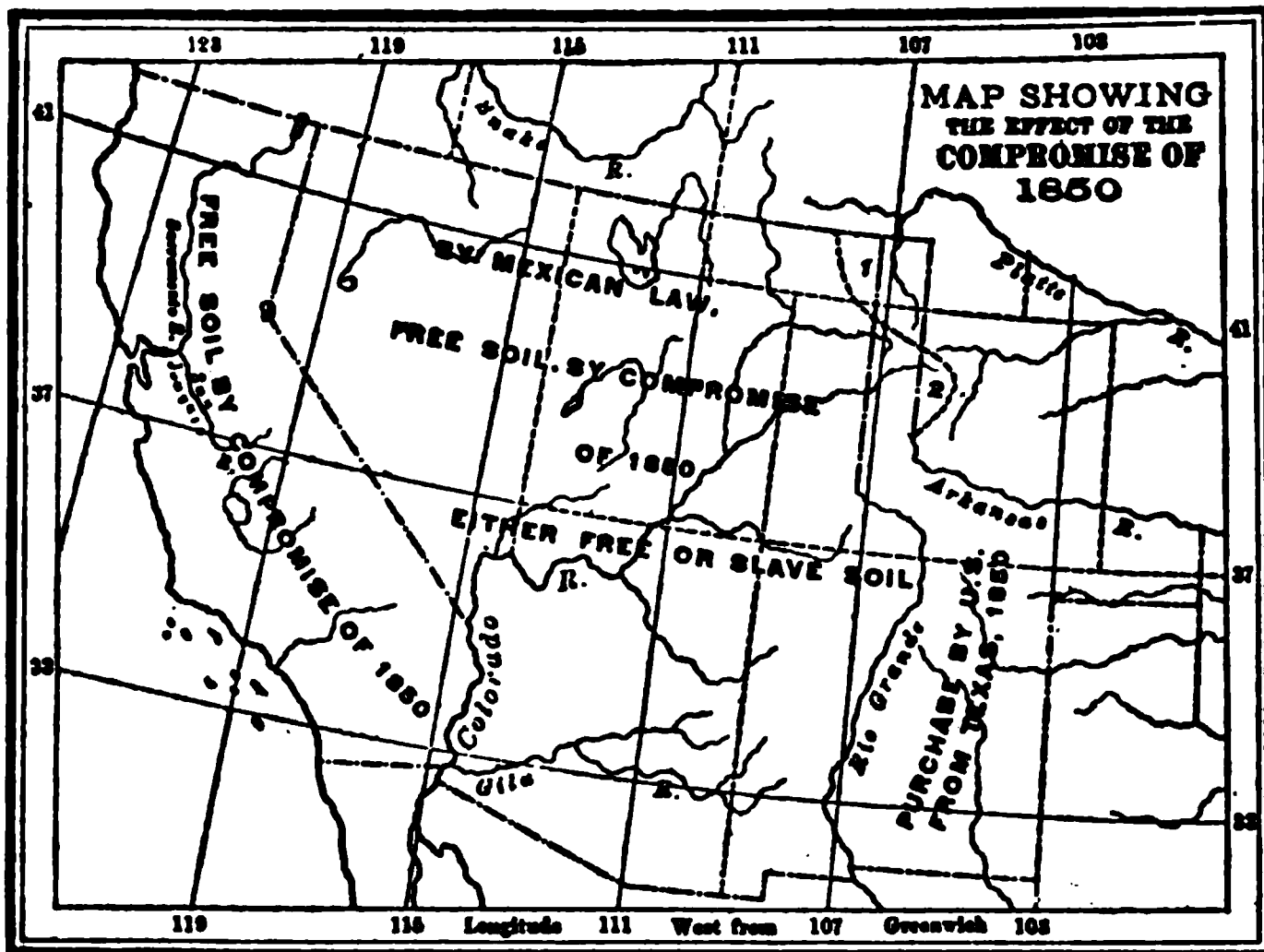
<sup>2</sup> Johnston's American Orations, II, 134.

<sup>3</sup> The Texas bill; the bill for the territory of New Mexico; the bill for the admission of California; the Utah bill, September 9; the fugitive slave law, September 16; the abolition of the slave trade in the District of Columbia, September 20, 1850; Statutes at Large, IX, 446-467.

main free soil. Immigration would settle the question of slavery in Utah and New Mexico. It was checked at least at the western boundary of Texas, and was limited in the further West by California. The new States which would be formed in the Missouri and Oregon territories would undoubtedly be free soil, and though four States might be carved out of Texas, their creation seemed an event too remote to constitute an important factor. The discussion on slavery which the Compromise had precipitated exhausted the subject and was never again equaled in Congress. Seward's prophetic words might come true, but the slavery question had passed the phase of discussion, and would soon be settled by another arbiter to whose decision, if the South insisted on the supremacy of Calhoun's principles, the long debate would prove merely a prelude. The Southern Senators promptly protested against the admission of California, and if the South supported the protest, there would follow a dissolution of the Union. Amidst the discussion of the Compromise, President Taylor died; the Nation for a time was stirred by the pathos of his dying words, "I have always done my duty."<sup>1</sup> Webster's seventh of March speech broke the strands which had held him to the hearts of the people. They had long looked upon Clay as the embodiment of eloquence, patriotism and a capacity for compromise. Seward was the new man, though he had already served the public twenty years; he was welcomed as the man who had uttered the sentiments and aspirations of a new age. The country was entering into a corrective period, which was to be controlled by the principles of the higher law.

The majority of the American people at this time believed that the Compromise of 1850 forever settled

<sup>1</sup> July 9, 1850.



the great questions which had so long harassed the country. Clay was hailed as a second saviour of his country. The thirty years since the outburst of the Missouri controversy had brought him forward three times, and as was believed, at three crises in our national affairs. By his sagacity the Missouri question had been amicably adjusted in 1820; nullification had been checkmated in 1832, and now, greatest of all, the Union had been preserved. But there were many who were wondering whether the new Compromise would last; that was the great question of the future. Before recording the answer, which the event of the next ten years gave, let us examine the interpretation which the courts had been making of the principles of American government, comprising the law of the Constitution.



## CHAPTER III.

### THE LAW OF THE CONSTITUTION.

The earliest interpretation of the Constitution is found in the debates of the Convention which framed it. These we have already recorded. While it was before the States it was examined and defended in the *Federalist*, a classic exposition to which all students of American government must turn for a philosophical examination of all the principles underlying it. But for the authoritative judicial exposition of the law of the Constitution, at once clear, creative, logical and complete, we must turn to the decisions of John Marshall. It was a supreme satisfaction to John Adams, in his old age, that the greatest act of his administration had been the appointment of Marshall, on the last day of January, 1801, as Chief-Justice of the United States. Marshall served thirty-four years, during which time, it is not unjust to say, he established the principles of our national system of government and laid the foundations of American constitutional law. There were perhaps more learned lawyers in America than he, when, at the age of forty-five, he was made Chief-Justice, but there is no evidence that any of his illustrious contemporaries equaled him in the faculty of discriminating principles and comprehending moral and legal rights. William Pinkney, unsurpassed in legal acumen, and his fame is yet undimmed, only anticipated the judgment of posterity, when he declared that John Marshall was born to be Chief-Justice of any country in which he lived. Marshall derived great assistance from the arguments of counsel. The practitioners in the Supreme Court in his day included Webster, Pinkney, Ingersoll and William Wirt.

His indebtedness to these and to less famed lawyers was heavy, but it never involved his clear title to be called the foremost judge and jurist America has produced.

It is not too much to say that the fate of the national government hung in the balance in the cases which he decided. His presentation of principles and his decisions shine among the most brilliant achievements of American statesmen, during the first half of our national existence; and his working propositions of republican government have come to be accepted as fundamental.

No man doubts that Marshall's decisions were more or less affected by his Federalist opinions. We have seen how, in the Virginia ratifying Convention, he was recognized as a leader of his party in support of the Constitution. There he took broad and philosophical views of our national system and prepared the way for his appointment as Chief-Justice and for that interpretation of principles which it is believed he established for all time. While he presided over the Supreme Court sixty-one cases arose involving constitutional questions, and he gave decisions in thirty-six of these. Not one principle which he laid down has been abandoned or one of his great decisions reversed. The Supreme Court is entrenched in our civil system and constitutes the most stable department of our government. In consequence, its decisions may long run counter to the doctrines of the political party in power. This was the case throughout nearly the whole of Marshall's judicial life. There was nothing in common between his decisions and the doctrines of the Democratic-Republicans, as organized, at one extreme, by Jefferson, and, as applied, at the other extreme, by Jackson. Jefferson would gladly have abolished the life tenure in the federal court, and had he or his party been able to do so, there is no doubt the Constitution would never

have received that national interpretation which distinguish Marshall's decisions. We may anticipate events and say that the most remarkable fact pertaining to Marshall's decisions and the administration of the general government by the Democratic party from John Adams to Lincoln, was the survival of the interpretation of principles laid down by the Court in Marshall's time, and the abandonment at last by the American people of many of the distinctive doctrines which the Democratic party long held.

The closing years of Marshall's life were made anxious by changes in the personnel of the Court which seemed to threaten the overthrow of these principles. The long continued triumph of the Democratic party, which began with the election of Jefferson in 1800, culminated toward the close of Marshall's life in the election of Jackson, and the transformation of the Court, by new appointments, into a body of strict constructionists. Marshall's associates, during the greater part of his long term, held political opinions more or less broad and liberal like his own. But as, one by one, his early associates passed away, Democratic Presidents appointed men who held opinions quite the opposite of his own, so that by 1830, the Court had become re-organized and Marshall stood almost alone. The appointment of his successor, Roger B. Taney, in 1835, by President Jackson, completed the change, and for twenty-eight years the Court was in many respects Democratic in its decisions, as under Marshall it had been Federalist. But during this time fewer cases of the rank of those which Marshall had decided, reached the Court. The most famous was the Dred Scott case, and that, in its pro-slavery conclusions, was speedily reversed by the events of the Civil War. Prior to Marshall's appointment, the Court had been in existence eleven years

and had handed down decisions in six cases involving the construction of the Constitution. Of these the most important was the *Chisholm* case, in 1794, of which an account has already been given, and the decision in which, as we have seen, was soon overruled by the adoption of the Eleventh Amendment.<sup>1</sup>

The interpretation which the authors of the *Federalist* put upon the principles of the Constitution was made before it had been tried as a working scheme of government. The law of the Constitution laid down by Hamilton, Madison and Jay anticipated the conclusions of courts and the platforms of political parties. We were the first people to begin national life with a written Constitution and its interpretation was bound to conform, from the nature of the case, to those conditions which had contributed to make it one of the great, controlling facts in national life. Though complete within itself, the Constitution did not, because it could not, display the whole civil structure of the Nation, for many particular features were presented only by the State constitutions.<sup>2</sup> As the supreme law of the land it was intended to regulate the rights and to protect the interests of States and of individuals, impartially. This comprehensive and integral character was due to its origin in the will of the sovereign people by which they declared the form of government under which they chose to live and the powers and limitations which they imposed upon their agents in its

<sup>1</sup> See Chap. II. For a later exposition of the principles in *Chisholm vs. Georgia*, see *Hans vs. Louisiana*, 134 United States, 1, (1889.)

<sup>2</sup> The Federal Supreme Court, Its Place in American Constitutional System, by Thomas Cooley, LL.D. in *A Constitutional History of the United States as Seen in the Development of American Law*. A course of lectures before the Political Science Association of the University of Michigan, by Judge Cooley and others: G. P. Putnam's Sons, 1890, p. 31.

administration. They raised it of their own will as the standard of their system of political ethics.

The national political system, as embodied in the Constitution, was, in part, a creation, and chiefly as it was a composite piece of work: but when we give due consideration to its derivative features,<sup>1</sup> we must in justice conclude that while it remains a distinctively American work, its nativity lies in its principal sources, the earlier State constitutions and the practices and customs of the American people. Its original character consisted largely in the selection which its framers made and in the application of that which they selected. The Federal Convention of 1787 acted as a Grand Committee of the Nation and referred its work for approval to the sovereign body which it represented, the people acting as State communities. By them it was ratified and given the seal of sovereignty.

The character of the Constitution will be clearly grasped if it be conceived, as it was originally intended to be,—as a plan, or form of government. It was not self executing. "The powers of government are to be exercised not by the sovereign authority, but by officers and departments created as agents for the purpose, and clothed for the time being with certain delegated functions. The legislature is itself one of these agents, with powers limited in the delegation, so that in the nature of things it is impossible that it should assert and take to itself the complete legislative power, expressed in the term 'legislative omnipotence,' which is claimed and exercised by Parliament of the British Empire."<sup>2</sup> The purpose, conscious or unconscious,

<sup>1</sup> See Vol. III, Book VI, Ch. VI.

<sup>2</sup> Justice Cooley, *The Federal Supreme Court*, in *Political Science Lectures*, 1889, University of Michigan, 33.

which the founders of our government had when they framed the Constitution was primarily to secure practical certainty in the theory and administration of the public business. They conceived of the State as having definite form and a definite purpose, and of the administration of government as conducted by definite procedure. This explains primarily the importance which the American people attached to the Constitution, whether the administration of the government was in the hands of Federalists, Democrats or Whigs. The ideals of a party, and the fruit and consequences of its elevation to power were judged, at least by the people, by the standard of the supreme written law.

A moment's reflection will show that this was a unique political position for any people. Not the least important consequence was the growth of political ideals, toward the realization of which every party asserted that it was moving. The position gave to the people the means of independent judgment, for not only did they pass judgment on the principles of a party and the results of its administration of the government as things to be approved or disapproved in themselves, but, of greater consequence, they judged party principles and administration as measured by the ideals of a national political system embodied in the Constitution. Thus it followed all through these turbulent years, from the close of the Revolution to the adoption of the Compromise of 1850, that every party was in turn subjected by the people to the same general tests, partly practical but largely ideal and abstract. Yet it must be admitted that the principles of the American system were more or less familiar to the people, as was shown repeatedly by their devotion to the law of rotation in office by which the administration of public business was, in the course of these seventy-five years, committed

to a succession of new men and the public business was not wholly mismanaged. The inquiry, then, is a natural one, What was the law of the Constitution as interpreted by the American people during these years? Whence did it originate? We have seen that the powers of Congress and of the President were diversely interpreted by these departments of government and still more diversely by political parties. But the fundamentals of the American political system were interpreted by another power also, the Judiciary,—the most unique factor in our national life.

The courts of law, State and Federal, hold a place in our system unparalleled in the political system of other countries. The functions which the courts perform are partly an inheritance, but largely the creation of the founders of our government. When the Constitution was framed, the original features of the judicial powers comprised the great departure from older political systems. The judicial power of the United States was not established merely to create a tribunal which should pronounce in the last resort the constitutionality or the unconstitutionality of an act of Congress. That power was established to determine all cases in law and equity arising under the Constitution and also the laws of the United States and treaties made under its authority. While the Constitution was before the States for ratification, one unfailing source of opposition was to the dangerous power which the exercise of the functions of the Federal judiciary would give to the United States, making it a consolidated government. It was feared that the States would be swallowed up and their political identity wholly lost. The Anti-Federalists and their political heirs, the Democratic-Republicans and Democrats, viewed the Federal judiciary with distrust. We have seen how as soon as

political parties were organized, hostility to the judicial power of the United States took form and again how President Jackson practically nullified a decision of the Supreme Court, and in one of the most vigorous of messages claimed that each department of the government is empowered to interpret the Constitution to suit itself.<sup>1</sup>

There was bound to come a time in the history of the country when a test, of some kind, would be made of the limit of legislative power. In 1787, the year when the Constitution was framed, the Court of Conference of North Carolina, with great reluctance, gave a decision in a case involving this issue and pronounced an act of the Legislature unconstitutional, because it took away the right of trial by jury.<sup>2</sup> This conclusion was vigorously assailed, at the time, as destructive of the liberties of the people, but it was to be sustained by a succession of similar decisions. Opposition in North Carolina, like that in Rhode Island the year before<sup>3</sup> over the stay laws, grew out of the misconception of the powers of the legislature. In the earlier years of our independence the notion prevailed that the Legislature could do no wrong. This delusion accompanied the transition from the sovereignty of the King to the sovereignty of the people, for the legislature represented the people.<sup>4</sup> The notion of a paramount legislature was easy to the Americans of the revolutionary era. The decision of the North Carolina court, therefore, that an act of the legislature might be unconstitutional, was quite without precedent and laid the foundation of the law of the Constitution itself, namely, that the acts of any department of government must conform to the

<sup>1</sup> Veto Message, U. S. Bank, July 10, 1832; Richardson, II, 582.

<sup>2</sup> *Den D. Bayard and wife vs. Singleton*, 1 Martin, McCawley, 42.

<sup>3</sup> In the case of *Trevet vs. Weeden*. For an account of this case, see Vol. I, p. 268.

<sup>4</sup> *Id.*



principles of the political system. The decision was contrary to the custom of England, for acts of Parliament were of paramount authority.

That a court of law should presume to set aside an act of Parliament may be said never to have been thought of in colonial times. In England there was no written Constitution by which a statute could be tested, but in America the case was widely different. Here, as Mr. Justice Patterson said, eight years later than the North Carolina decision, "Every State in the Union has its constitution reduced to written exactitude and precision."<sup>1</sup> And he gave a definition of a constitution, one of the earliest made by an American jurist, that it is "the form of government delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established." Legislatures, he declared, are the creatures of the Constitution. "It is their commission; therefore all their acts must be conformable to it, or else they will be void. The Constitution fixes limits to the exercise of legislative authority and prescribes the orbit within which it must move; \* \* \* it lies at the foundation of all law and is a rule and commission by which both legislatures and judges are to proceed; the judiciary in this country is not a subordinate but a co-ordinate branch of the government."

The national Constitution, and the State constitutions which preceded it, in establishing a judiciary and vesting it with power to decide finally in all cases of law and equity and to construe its own jurisdiction and also that of the legislative and the executive, created a precedent in government. When it is remembered that the American judiciary, as Justice Paterson defined it, began at the time of the Revolution,—as it were but yesterday,—it

<sup>1</sup> Vanhorn's Lessee vs. Dorrance, 2 Dallas, 304; (1795.)

seems strange that the world waited so long for so useful an institution. But the American judiciary was contemporaneous with the establishment of popular government. Such an institution was impossible as long as sovereignty was supposed to reside only in the Crown. As soon as the Revolution terminated, the judiciary, as conceived in the American system of government, became a necessary and resulting organization. That the understanding of the nature and scope of the judiciary was vague at the time of the Revolution is evident from an examination of the first State constitutions.<sup>1</sup> Though tolerably exact and clear in their legislative and executive provisions, these were vague and indefinite in their provisions for the judiciary, and it is impossible to obtain from them, alone, a correct idea of the practical character and jurisdiction of the various American courts. But this omission proved highly advantageous in the end, for the courts were left quite free to define their own jurisdiction, and this they speedily did, as in Rhode Island and North Carolina.

It was apprehended by opponents of the Constitution that the establishment of a dual political system would produce endless discord and controversy between the States and the Federal government.<sup>2</sup> A case soon arose. The constitution of Georgia of 1777 did not forbid its legislature to pass an act of attainder and confiscation. On the fourth of May, 1782, the legislature passed an act banishing certain persons from the State, declared them guilty of high treason and confiscated their property. The question was whether the legislature could pass such an

<sup>1</sup> For an account of them see my *Constitutional History of the American People, 1776-1850*, Vol. I, Chapters II, III, IV, V.

<sup>2</sup> This is discussed by Hamilton in the *Federalist*, Nos. LXXXI, LXXXII, LXXXIII.

act. The Supreme Court of the United States, before which the question came, handed down a decision defining the difference between laws passed by the individual States, during the Revolution and before the adoption of the Federal Constitution, and laws passed after its adoption.<sup>1</sup> The issue was in every way important for it involved the relative authority of the two systems of government, the State and National. At this time, 1800, the opinion generally prevailed that the Supreme Court of the United States could not declare an act of Congress unconstitutional, but the Court itself had made no decision on this point. It was a question, whether the legislature of Georgia, in the face of the silence of the State constitution on the subject, could assume the judicial function and issue a decree of banishment and confiscation. Justice Paterson held that to authorize the Supreme Court to pronounce any law void, "it must be a clear and equivocal breach of the Constitution, not a doubtful and argumentative application;" and Justice Cushing was of the opinion that the Supreme Court of the United States possessed the same power as that of Georgia to declare the law void, but thought that the exercise of the power unwarrantable, and agreed with Paterson that the right to confiscate and punish must belong to every government, and, as it was within the judicial power by the constitution of Georgia it naturally as well as tacitly belonged to the legislature. Thus the Georgia act was sustained by the Supreme Court of the United States, because it was sustainable under the constitution of Georgia on the ground that a State constitution in force before the inauguration of the national government was to be construed by its own provisions.

The functions of the judiciary and its co-ordinant rank

<sup>1</sup> Cooper vs. Telfair, 4 Dallas, 14.

in our system of government were clearly defined by Chief-Justice Marshall in 1803.<sup>1</sup> He laid down the principle that it is the province and duty of the judiciary to say what the law is. The co-equal rank of the judiciary with the executive and legislative had been asserted and, in part, admitted, he said, at the time of making the national Constitution. That the judiciary, in cases of doubt where two laws conflict with each other, should be paramount in determining which should prevail, was practically a new doctrine, but one necessarily springing from the concept of democracy in America, that the original supreme will of the people had organized the government, had assigned to different departments their respective powers and had defined their boundaries by a written constitution: "So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case so that the court must either decide that case conformably to the law, disregarding the Constitution, or, conformedly to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty." Thus the very existence of a supreme written law implies paramount functions in the court to determine whether an act of the legislature is repugnant to the Constitution.

The court therefore exercised this paramount function because the Constitution is a paramount law, otherwise, as Marshall said, a written constitution which "we have deemed an improvement on political institutions" would be reduced to nothing, and there would exist no means by which to interpret the ultimate will of the sovereign body. Having declared this ultimatum, the court could go no further, for it could not execute its own decrees, but must depend upon the executive, and possibly upon

<sup>1</sup> *Marbury vs. Madison*, 1 Cranch, 137. (1803.)

the legislative. The law of the Constitution was laid down, that in determining what shall be the supreme law of the land the Constitution itself comes first, and those laws only which are made in pursuance of it. This doctrine, familiar to us now, was a novel one at the opening of the nineteenth century, and placed the American judiciary in a position unparalleled in the history of government. Although the decision in the particular case was never executed,<sup>1</sup> the principle which Marshall laid down in the decision was destined to regulate all later interpretation of the functions of the judiciary.

It has long been an established principle in English law, that an act of Parliament, duly made, is the exercise of the highest authority acknowledged in the Kingdom; that Parliament has power "to bind every subject in the land and the dominion thereunto belonging nay, even the King himself, if particularly named." And the act could not be altered, amended, dispensed with, suspended or repealed, except in the same forms and by the same authority of Parliament, according to the political maxim that it requires the same strength to dissolve as to create an obligation.<sup>2</sup> One Parliament cannot bind an-

<sup>1</sup> President John Adams had nominated one Marbury to a judicial office and he had been confirmed by the Senate. His commission was made out and signed and sealed but had not been delivered to him. Madison, Secretary of State under Jefferson, refused to deliver it. Marbury claimed title to the office and applied directly to the Supreme Court for a written mandamus. Chief-Justice Marshall held that when the commission was signed and sealed the appointment was complete, and vested in Marbury a legal right to the office, but refused Marbury's application, holding that the thirteenth section of the judiciary act of 1789, purporting to give the Supreme Court jurisdiction in proceedings original and not appellate, to issue writs of mandamus to public officers was not warranted by the Constitution and was therefore inoperative and void.

<sup>2</sup> Blackstone, Book I, Chap. ii, p. 186.

other. This principle was not accepted, in its entirety, in America, but as much of it as prevailed in our political system was defined by Chief-Justice Marshall in 1810, that "one legislature is competent to repeal any act which a former one was competent to pass; and that one legislature cannot abridge the powers of a succeeding one."<sup>1</sup> At the same time he stated the relation between the United States and the several States.

In adopting the Constitution the people manifested a determination to shield themselves and their property from the effects of sudden and strong passion to which men are exposed, and therefore, restrained the State legislatures from passing laws violating the obligation of contracts;<sup>2</sup> the Constitution itself contains what may be deemed a Bill of Rights for the people of each State. This sustained the opinions of Hamilton and Wilson when the Constitution was before the States for ratification,—that it is a Bill of Rights.<sup>3</sup> It answered many objections advanced at the time of ratification and anticipated many more which arose later. It authoritatively expressed a sentiment, now more or less familiar but not generally accepted during the first seventy-five years of our national history, that all rights of the States and of individuals are guaranteed by the national Constitution. Marshall's opinion, in its varied application, placed the entire economic interests of the American people within the jurisdiction of the national government, and tended powerfully, during these years, to evolve that sentiment of nationality which found expression, almost for the first time, during the debates on the Compromise of 1850. It is difficult to realize the full significance of his de-

<sup>1</sup> *Fletcher vs. Peck*, March 16, 1810, 6 Cranch, 87.

<sup>2</sup> Constitution, Article VII, Section 10, Clause 1.

<sup>3</sup> Page 22, ante.

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cision. It is not too much to say that he laid down the principle on which civil homogeneity could be assured to the Nation. The decision and the long line of later ones in conformity with it gave to the national judiciary a prestige which may be compared to that secured to the national honor by adherence to the amendments of later years guaranteeing the validity of the public debt.<sup>1</sup>

With a written Constitution considered of such paramount authority in the American system, the time was sure to come when it would be necessary to define exactly, and with authority, the character of that Constitution and particularly its origin and the principles according to which it should be interpreted. The Articles of Confederation were established by the States in their sovereign capacity. The delegates to the Federal Convention of 1787 were chosen by the several State legislatures. The transition from the old Confederation to the new Nation was not marked by a corresponding change in public sentiment or by such an enlightenment of the public mind as to make clear to all the people of the United States the real character of the new government.

Though the framers and supporters of the Constitution wrote freely and with authority of its scope and meaning, it was not until thirty years had passed that the nature of the new government was set forth by judicial authority. "The Constitution of the United States," said Mr. Justice Story, in one of the great decisions that has come down to us,<sup>2</sup> "was ordained and established, not by the States in their sovereign capacity, but emphatically, as the preamble of the Constitution declares, by the 'people of the United States.'" They had the right "to prohibit to the States the exercise of any powers which were, in their judgment,

<sup>1</sup> Article XIV, Clause 4. See Vol. III, Bk. VI, Ch. VII.

<sup>2</sup> *Martin vs. Hunter's Lessee*, 1 Wheaton, 304. (1816.)

incompatible with the objects of the general compact; to make the powers of the State governments, in given cases, subordinant to those of the Nation or to reserve to themselves those sovereignties which they might not choose to delegate to either. The Constitution was not, therefore, necessarily created out of the State sovereignties, nor by a surrender of powers already existing in State institutions; for the powers of the States depended upon their own constitutions; and the people of every State had the right to modify and restrain them, according to their own views of policy and principle. On the other hand, it is perfectly clear that the sovereign powers vested in the State governments, by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States."

This deduction was clear from the nature and the language of the Constitution itself,—that, "all the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, was reserved to the States respectively or to the people."<sup>1</sup> The conclusion followed, therefore, that the government of the United States, "can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication." But the instrument, like every other grant, should receive a reasonable construction. A power expressly given in general terms was not to be restrained to particular cases "unless that construction grows out of the context expressly, or by necessary implication." Words were to be taken "in their natural and obvious sense and in no sense unreasonably restricted or enlarged."

<sup>1</sup> Article X.

Necessarily the Constitution must deal in general language. "It did not suit the purposes of the people, in forming this charter of their liberties, to provide for minute specifications of its powers, or to declare the means by which these powers were to be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure for a long lapse of ages, hence its powers are expressed in general terms, leaving to the legislature from time to time to adopt its own means to effectuate legitimate objects and to mold and model the exercise of its powers as its own wisdom and the public interests would require. This proved a comprehensive summary of the general character of the national government and is in marked contrast with the prolix and laborious message of Monroe on the subject of internal improvements transmitted to Congress in 1822.<sup>1</sup>

But Monroe and Story were not of the same political school. By Story's decision, internal improvements could be made at national expense; by the doctrine of Monroe's message, they could be made at national expense only after an amendment of the Constitution.

The right of a federal court to pronounce a legislative act null and void was not likely to go long unchallenged. As soon as the decision displeased a powerful political party it was likely to be made a political issue. The doctrine that the federal judiciary possessed absolute power to declare, if not to correct, abuses in legislation was reviewed adversely in 1825, by John Bannister Gibson, Chief-Justice of Pennsylvania.<sup>2</sup> He considered the right

<sup>1</sup> See p. 359.

<sup>2</sup> In a dissenting opinion in *Eakin vs. Raub*, 12 Serg. & R., 330.

to declare all unconstitutional acts null and void, without distinction as to either the Constitution of the United States or that of a State, to be rather a "matter of faith than of reason," and thought it somewhat remarkable, that although the right had long been claimed by the judiciary, no judge had ventured to discuss it, except Chief Justice Marshall.<sup>1</sup> He acknowledged that the right had been universally assumed by the American courts, but thought that judges who asserted it ought to be prepared to maintain it on constitutional principles. He divided the powers of the judiciary into those political and those purely civil, for he conceived that every power by which one department of the government is enabled to control another, or to influence its acts, is political.

The political powers of the judiciary, he declared to be external and adventitious, as, for instance, those derived from certain provisions in the Constitution, and they were derived by direct grant from the common fountain of all political power. On the other hand, the ordinary and appropriate powers of the judiciary were civil, "being part of its essence" and existing independently of any supposed grant in the Constitution. "Where the government exists by virtue of a written constitution, the judiciary does not necessarily derive from that circumstance any other than its original and appropriate powers." He believed that the power in question did not necessarily arise from the fact that the judiciary was established by a written constitution, but that this department could not claim on account of that circumstance powers that did not belong to it at the common law; and whatever might have been the original cause of the limi-

<sup>1</sup> In *Marbury vs. Madison*, 1 Cranch, 137; the opinion of Justice Patterson in *Van Horne vs. Dorrance*, 2 Dallas, 1304, Judge Gibson considered as metaphorical rather than argumentative.

tation of its jurisdiction it could exercise no power of supervision over the legislature "without producing a direct authority for it in the Constitution, either in terms, or by irresistible implication from the nature of the government: without which the power must be considered as reserved, along with the other ungranted portions of sovereignty for the immediate use of the people.

He then proceeded, in a dissenting opinion, to formulate a doctrine which has since been relied on by all parties whenever the authority of a court to call in question the constitutionality of a law has been doubted. His opinion greatly influenced President Jackson, seven years later, when he called in question the validity of Marshall's decision, given in 1819, on the constitutionality of the National Bank.<sup>1</sup> The opinion has been the quarry out of which politicians have freely hewn material with which to build defenses to protect the executive and legislative against so-called judicial usurpation. Gibson considered a constitution to be an act of external legislation by which the people established the structure and mechanism of their government, and by which they prescribed fundamental rules with which to regulate the motion of the several parts.

Thus far he was in accord with Jefferson, whose similar views of the Constitution are well known. A statute, according to this distinguished Pennsylvania judge, is an act of ordinary legislation, the provisions of which are to be executed by the executive, or the judiciary or by subordinate officers. A constitution, said he, contains no practical rules for the administration of distributive justice, with which alone the judiciary has to do; these

<sup>1</sup> In *McCulloch vs. Maryland*, 4 Wheaton, 316; See Jackson's opinion ante, p. 408. For an account of Jackson's attitude toward this decision, see pp. 409-410.

being furnished in acts of ordinary legislation by that organ of the government, which in this respect is exclusively the representative of the people; and it is generally true that the provisions of a constitution are to be carried into effect immediately by the legislature and only mediately, if at all, by the judiciary. He denied that in a case of doubt whether the legislature had the right to pass an act, the judiciary could lawfully decide the matter. For if so, the court must be a peculiar organ to correct the mistakes and revise the proceedings of the legislature. Of those viewing the matter in the opposite direction, he inquired, what would be thought of an act of assembly that should declare that in a particular case the Supreme Court had put a wrong construction on the Constitution, and therefore its judgments should be reversed? Yet Jackson put this interpretation upon Marshall's opinion in the bank case, and considered that his own re-election to the Presidency was a popular verdict of disapprobation of the court's opinion. Gibson declared that for a court to declare a law void which had been enacted according to the forms prescribed in the Constitution would be a usurpation of the legislative power, for it would be an act of sovereignty, and sovereignty and legislative power, according to Blackstone, were convertible terms.

It was the business of the judiciary to interpret the laws, not to scan the authority of the law-giver, and without examining his authority it could not take cognizance of a collision between a law and the Constitution. Gibson's conclusion of the whole matter was, that "to affirm that the judiciary has a right to judge of the existence of such a collision was to take for granted the very thing to be proved." He asserted that legislative acts should

be given the same respect claimed for judicial. The legislature was entitled to all the deference due the judiciary, and its acts were in no case to be treated as *ipso facto* void unless they should produce a revolution in the government. To avoid them would require the act of some tribunal, if there were any such, competent under the Constitution to pass on their validity. But the question would arise whether the judiciary or the people were that tribunal. All the organs of the government, he declared to be of equal capacity; if not, each must be supposed to have a superior capacity only for those things which particularly belong to it, and as legislation particularly involved the consideration of limitations put on the law-making power, and the interpretation of the laws when made involved only the construction of the laws themselves, it followed that the construction of the Constitution in this particular belonged to the legislature. "It ought, therefore, to be taken to have a superior capacity to judge of the constitutionality of its own acts."

But if each department was of equal rank with the others, why should one exercise a controlling power over the rest? It had never been pretended that the judiciary was of superior rank, though it had been said to be co-ordinate. It was not easy, he said, to comprehend how the power which gave the law to all the rest could be of no more than equal rank with one which received it and to which it was answerable for the observance of its statutes. Legislation was essentially an act of sovereign power, but the execution of the laws by instruments, which were given by prescribed rules and exercised under power of volition, was essentially otherwise. The very definition of law, "a rule of civil conduct and prescribed by the supreme power in the State," showed the intrinsic superiority of the legislature. But it might be said that

the power of the legislature was limited by prescribed rules. Gibson accepted this, but declared that, nevertheless, the power of the legislature was the power of the people, and "sovereign as far as it extends." He denied that the judiciary was co-ordinate with the legislature merely because it was established by the Constitution. If that were sufficient, he said, then the sheriff, or the register of wills, or the recorder of deeds would be co-ordinate also. Within the pale of their authority the acts of these officers would have the power of the people for their support; but no one pretended that they were of equal dignity with the acts of the legislature. Inequality of rank, he said, arose not from the manner in which the department had been constituted, but from the essence and naturally from its functions. The legislative department was superior to every other, "inasmuch as the power to will and command is essentially superior to the power to act and obey."

This idea, it may be observed, accorded exactly with the one prevailing in the eighteenth century, that the legislature is the nucleus of all authority. It was essentially the common law idea of the sovereignty of Parliament, and constituted the basis of Justice Iredell's dissenting opinion in that great case decided by the Supreme Court in 1794, that an American State can be sued: Iredell holding to the contrary, that the State standing as successor to the Crown, could be petitioned but not sued, for by its nature in the American system it was a sovereign body. This dissenting opinion was accepted as the true interpretation of the State, and the principle which regulated it was soon after recognized by the adoption of the Eleventh Amendment.<sup>1</sup> Gibson's idea was to come up, again and again, in our political history and throughout

<sup>1</sup> January 8, 1798.



the period from the Revolution to the Compromise of 1850, it received formidable support. A government constructed on any other principle than that which he laid down, he believed, would be in perpetual danger of standing still. For the right to decide on the constitutionality of laws would not be peculiar to the judiciary but would reside equally in the person of every officer whose agency might be necessary to carry them into execution. The substance of the doctrine which he laid down was expressed in his statement that with the people only rested full and absolute power "to correct abuse in legislation by instructing their representatives to repeal the obnoxious act." Any other method would be an infringement of popular rights.

The political analogue to this opinion was expressed by Jackson seven years later in his message vetoing the act to continue the Bank of the United States.<sup>1</sup> Referring to Marshall's decision on the constitutionality of the original act incorporating the bank,<sup>2</sup> Jackson went the whole length of Gibson's dissenting opinion: "If the opinion of the Supreme Court," said the President, "covered the whole ground of this act, it ought not to control the co-ordinate authorities of this government. The Congress, the Executive and the court must each for itself be guided by its own opinion of the Constitution. Each public officer, who takes an oath to support the Constitution, swears that he will support it as he understands it and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval, as it is of the Supreme Judges when

<sup>1</sup> July 10, 1832, Richardson II, 582.

<sup>2</sup> Statutes at Large, III, 266; April 10, 1816.

it may be brought before them for judicial decision. The opinion of the Judges has no more authority over Congress than the opinion of Congress has over the Judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control Congress or the Executive when acting in their legislative capacity, or to have only such influence as the force of their reasoning may deserve."

Before the utterance of these opinions by the Chief Justice of Pennsylvania and President Jackson, only the germs of their controlling idea were to be found in the speeches and writings of American statesmen. The idea is traceable in the debates of some of the ratifying conventions of 1788, but it did not reach the dignity and influence of a judicial utterance and a party maxim until the days of Gibson and Jackson. The notion that the correction of legislative abuses is to be sought not in the opinion of the courts, but at the polls, was given the seal of authority, as Jackson and his followers believed, by the overwhelming support which he and they received at the November election in 1832, when the renewal of the bank's charter was a national issue.<sup>1</sup> It was the first great stride of the American people toward populism. Its practical effect, which was to be too far-reaching even to estimate, dates from Jackson's veto message on the bank bill. The whole motive of the idea was to prove that the judiciary in the American system of government is not a peculiar organ under the Constitution to prevent legislative encroachments on the powers reserved by the people. In other words, Gibson, Jackson and their supporters would have the American people depend, not on the

<sup>1</sup> November 6, 1832. The popular vote for Jackson and Van Buren was 687,502; for Clay and Sargeant, 530,189.

courts, but on themselves to correct abuses that might arise under the political system.

Gibson declared that the notion of a complication of counter checks, and he meant by this the doctrine of checks and balances of which Hamilton and his school made so much account, as a preventive of abuses had been carried to an extent in theory of which the framers of the Constitution had never dreamed. "When the entire sovereignty was separated into its elementary parts," said he, "and distributed to its appropriate branches, all things incident to the exercise of its powers were committed to each branch exclusively." The negative, which each member of the legislature might exercise in regard to the act of another, was thought sufficient to prevent material infraction of the restraints which were put on the power of the whole, and he insisted that had it been intended to interpose the judiciary as an additional barrier, the matter would not have been left in doubt: "The Judges would not have been left to stand on the insecure and ever shifting ground of public opinion as to constructive powers; they would have been placed on the impregnable ground of an expressed grant." So clear would have been their authority that they would not have been compelled to resort to the debates in the Convention that framed the Constitution or to the opinion that generally prevailed at the time of its formation. He would test a Constitution like a statute, it being presumed in their case that it contained the whole will of the body from which it emanated.

The whole doctrine of the judicial power, as laid down by Gibson, and as applied by Jackson in practical politics, was very alarming to the statesmen and politicians of the Federalist school. National Republicans like John Quincy Adams considered Gibson's opinion as embodying

the opposition to that broad construction of the Constitution which distinguishes the decisions of the Supreme Court in Marshall's time, and to the legislation for internal improvements, for the bank and for the tariff which the national Republican party labored to enact. Adams greatly feared that Gibson would be appointed to fill the vacancy in the Supreme Court of the United States, occasioned by the death of Bushrod Washington, in 1829. He was somewhat relieved when Henry Baldwin, another Pennsylvania judge, was selected. What touch of the true Adams spirit was there in this entry in the famous "Memoirs," after a call from Justice Baldwin? "This is a politician of equivocal morality," writes Adams, "but I hope will make a more impartial judge. I told him I had been gratified by his appointment, which was true, because I dreaded the appointment of Gibson, the Chief-Justice of Pennsylvania, precisely the most unfit man for the office in the United States."<sup>1</sup> Chief-Justice Gibson lived to change his opinion of the place and function of the American courts, and gave two reasons for the change.

In 1845, a case came before him involving the principles which he had laid down twenty years before.<sup>2</sup> The State of Pennsylvania had recently adopted a new constitution, that of 1838. Chief-Justice Gibson held that the Convention which framed it had by its silence sanctioned the pretenses of the courts to deal freely with the acts of the legislature. But his second reason was more persuasive: he had changed his opinion "from experience of the necessity of the case." The affirmation of Gibson's early opinion by President Jackson and by the people at his second election, happily did not enthrone

<sup>1</sup> *Memoirs*, VIII, 174.

<sup>2</sup> *Morris vs. Clymer*, 2 *Pennsylvania St.*, 281.

the idea that the American judiciary has no peculiar functions to construe the laws. On the contrary, a reaction set in, even at the time of Jackson's re-election. It may be said that any judicial review of American history, from the Revolution to the Compromise of 1850, would be false if it did not record not only the predisposition of the American people to recognize a peculiar function in the judiciary to construe the laws, but also to accept the decision of a lawfully organized court as final. The fundamental rule was briefly put by Webster, that the law is the supreme rule for the government of all, and it may truthfully be said that the most serious shock which American political institutions could have received during the first seventy-five years of their history, would have been the violation of the confidence which the American people, during that time, put in their courts.

A distinguished English jurist has pointed out that administrative law, the *droit administratif*, for which English phraseology supplies no proper equivalent, is unknown to English judges and counsel; and he has shown with equal truth that in countries, which like the United States have derived their civilization from English sources, the system of administrative law and the very principle on which it rested are unknown.<sup>1</sup> The term has made its appearance in recent years in America, and more particularly in institutions of learning, and has been used by some legal writers, but it was unknown to the American people during the period now under review. Administrative law, as defined by Mr. Dicey is "that portion of French law which determines the possession and

<sup>1</sup> A. V. Dicey, "The Law of the Constitution;" Chap. XII. See his discussion of the true nature of constitutional law in the first of his lectures introductory to the study of the law of the Constitution, pp. 1-34.

liabilities of all State officials; the civil rights and liabilities of private individuals in their dealings with officials as representatives of the State, and the procedure by which these rights and liabilities are enforced." In the United States the laws which regulated the conduct of public servants, from the Revolution to the Compromise of 1850, in no wise construed them a distinct class or imparted to them functions which in no sense were extra-legal,—legally or essentially different from those exercised by others. Public servants were understood to be only agents of the sovereign body,—the people,—and were responsible only to that sovereignty.

The idea was fully expressed by George Mason in the Virginia Bill of Rights of 1776, when he said, that, all power is vested in the people and consequently derived from them, and that magistrates are their trustees and servants and at all times amenable to them. Mason's ideas were found in all the State constitutions of the eighteenth century, which were modeled on the Virginia plan, and the concept of public law which they embodied may be said to have been common to every thinking mind in the country. By the term magistrates must be understood all public servants. Thus in America all legal relations were interpreted under the constitution and the statute, or the common law, and no right or interest was in any way affected because of the administrative service which a party to that right or interest was under obligation to give otherwise than as interpreted by the laws of the land. The theory of the American Constitution was one of the separation of powers, and it was carried out in practice by the interpretation of executive, legislative and judicial powers, by the courts. But there was no law for the construction of the powers of the separate departments other than that provided by the Constitution and the legislature.

There was no administrative law of the Executive, of the Legislative or of the Judiciary, or of the so-called executive Departments. The practice of a department, if lawful, might be cited as a precedent in court, but no departmental rule was suffered to prevail, if contrary to the common law or of a statute. In this respect, government in the United States is entirely different from government in France, where the law of the civil departments is construed by the courts as ancillary to the law of France. From this it follows that French officials compose a body distinct from the electors on the one hand, and from the Legislature, the Judges and the Executive on the other. It also followed that the state in France did not mean what it meant in America. Here the state is subject, at least in theory, to the same tests of law and equity as the individual; and official position, with the possible exception of that of the President, does not screen the individual from the responsibilities which he would be under in a private station.

The supreme character of the Constitution was first exhaustively investigated and defined in a decision by Chief-Justice Marshall in 1819.<sup>1</sup> The Convention of 1787 had assembled with the assent of the States, but the ratification of its work by the people was a final act, which, said Marshall, required no affirmance and could not be negatived by the State governments. "The Constitution when thus adopted was of complete obligation and bound the State sovereignties." But had not the people already surrendered all their powers to these sovereignties and had they any more to give? The question whether they might resume and modify the powers given to the government,

<sup>1</sup> *McCulloch vs. State of Maryland et al.*, 4 Wheaton, 316: confirmed by him in 1829, in *Weston et al. vs. The Council of Charleston*, 2 Peters, 449. (1829.)

Marshall considered no longer unsettled. "Much more might the legitimacy of the general government be doubted. Had it not been created by the States? The powers delegated to the State sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty created by themselves. To the formation of a league, such as was the Federation, the State sovereignties were certainly competent; but when, in order to form a more perfect Union, it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all. The government of the Union, then, is emphatically and truly a government of the people. In form and in substance it emanated from them, its powers are granted by them and are to be exercised directly on them and for their benefit. This government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it would seem too apparent to have required to be enforced by all these arguments which enlightened friends, while it was pending before the people, found it necessary to urge."<sup>1</sup>

Marshall declared that the principle was already universally admitted, but that the question respecting the extent of the powers actually granted was perpetually arising and would probably continue to arise as long as our system existed. But he laid down another proposition, which he declared must command universal assent: "That the government of the Union though limited in its powers, is unlimited within its sphere of action. This would seem to result necessarily from its nature. It is the government

<sup>1</sup> For these arguments see pp. 88, 97, 108, 109, 118, 120.



of all; its powers are delegated to all; it represents all and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The Nation on those subjects on which it can act must necessarily bind its component parts." But the question was not left to mere reason, for the people had decided it in express terms, by saying that the Constitution and the laws of the United States made in pursuance thereof, shall be the supreme law of the land, and by requiring members of the State legislatures and officers of the executive and judicial departments of the States to take the oath of fealty to it. "The government of the United States, then, though limited in its powers is supreme, its laws when made in pursuance of the Constitution form the supreme law of the land 'anything in the constitution or laws of any State to the contrary notwithstanding.' "

A constitution, said he, if it contained an accurate detail of all the subdivisions of which its great powers admit and of all the means by which they might be carried into execution, would partake of the prolixity of a legal code and could scarcely be embraced by the human mind. The public would probably never understand it. "Its nature, therefore," continued he, "requires that only its great outlines should be marked; its important objects designated and the minor ingredients which compose those objects be deduced from the nature of the objects themselves." That this idea was entertained by the framers of the Constitution, he thought, not only to be inferred from the nature of the instrument but from its language. It did not profess to enumerate all the means by which the powers which it confers may be executed, nor did it prohibit the creation of a corporation, meaning a United States bank, if the existence of such a being was essen-

tial to the beneficial exercise of those powers. "Should Congress," said he, "in the execution of its powers adopt measures which are prohibited by the Constitution, or under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government," it would become the duty of the Supreme Court "to say that such an act was not the law of the land. But where the law is not prohibited and is really calculated to affect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground." The Court disclaimed pretention to such a power.

"We admit," said he, "as all must admit, that the powers of the government are limited and that its limits are not to be transcendent. But we think the silent construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers it avers are to be carried into execution which will enable that body to perform the high duties assigned to it, in a manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consistent with the letter and spirit of the Constitution are constitutional."<sup>1</sup> We but follow an opinion of Chancellor Kent, when we say that no other decision by the Supreme Court gives so clear and satisfactory a statement of the supreme character of national laws.<sup>2</sup>

A great protest to this decision immediately arose from the powerful political party, which from its inception,

<sup>1</sup> 4 Wheaton, 421.

<sup>2</sup> Kent's Commentaries, twelfth edition, Vol. I, 428.

had opposed the principles of interpretation that Marshall followed in all his decisions. This protest found its highest official utterance in the message of President Jackson, already referred to, vetoing the bill for re-chartering the bank. It is safe to say that many thoughtful Americans, at the time the veto message was sent to the Senate, approved both the message and Marshall's decision. The bank was viewed by the masses as a dangerous corporation, and the public approved the President's veto. But Marshall's decision settled far more than the right of Congress to incorporate a bank. At a critical time in the history of the nation, he had boldly outlined the true character of the government which the people had ordained and established. He gave an authoritative definition of the nature of the jurisdiction of that government, and the jurisdiction thus outlined has never decreased. He recognized the discretionary rights of Congress. Two years later in an equally important decision he made a further contribution to the definition.<sup>1</sup> "The American States, as well as the American people," said he, "have believed a close and firm Union to be essential to their liberty and happiness. They have been taught by experience that this Union cannot exist without a government for the whole; and they have been taught by the same experience that this government would be but a mere shadow, that must disappoint all their hopes, unless invested with large portions of that sovereignty which belongs to independent States.

"Under the influence of this opinion and thus instructed by experience" the people in their respective State Conventions had adopted the Constitution. "If it could be doubted whether from its nature it were not supreme in all cases where it is empowered to act, that doubt would

<sup>1</sup> In *Cohens vs. The State of Virginia*; 6 Wheaton, 264. (1821.)

be removed by the declaration that 'this Constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby.'" "This," continued he, "is the authoritative language of the American people and of the American States. It marks with lines too strong to be mistaken the characteristic distinction between the government of the Union and those of the States. The general government, though limited as to its objects, is supreme with respect to those objects. This principle is a part of the Constitution, and if there be any who deny its necessity none can deny its authority." Passing on to certain great conclusions, he declared that the United States for many, and for most important purposes, formed a single Nation. America had chosen to be a Nation, her government was complete and competent to all the objects of nationality. In affecting these objects it could then legitimately control all individuals or governments within the American territory. The Constitution and laws of a State in so far as repugnant to the Constitution and laws of the United States, he declared, were absolutely void. The States were constituent parts of the United States, members of one great empire, for some purposes sovereign, for other purposes subordinate. Thus he reiterated and sustained the principle which Hamilton had laid down thirty years earlier in the *Federalist*.<sup>1</sup>

It was in this great decision that he laid down the principle that the mere fact that a State is a party to a suit, brings the case within the jurisdiction of the Federal Courts. Sixteen years before this the Supreme Court had

<sup>1</sup> No. XLII.

defined the term State,<sup>1</sup> That only members of the American Confederacy are the States contemplated in the Constitution and, therefore, that the term State as used in this country did not carry with it "the signification attached to it by the writers on the law of the United States." It is noticeable that Chief-Justice Marshall used the word Confederacy as synonymous for Union, a use common at the time and continued by National Republicans and Free-soilers and later by Republicans.<sup>2</sup> In defining the jurisdiction of the United States the court did not neglect, on a proper occasion, to define the jurisdiction of the State as "co-extensive with its territory and with its legislative power."<sup>3</sup>

The Constitution does not limit the jurisdiction of the United States so as to prevent in any way the expansion of the country beyond its original area. The principle involved was declared by the court in 1828, that "the Constitution confers absolutely on the government of the Union the powers of making war and of making treaties, consequently that government possesses the power of acquiring territory either by conquest or by treaty."<sup>4</sup> Thus, nearly a quarter of a century after the acquisition of Louisiana, and nine years after the acquisition of Florida the constitutionality of those acts was fully sustained. But the defenders of the Louisiana purchase at the time did not base their arguments on the war power of Congress, although Jefferson declared that the foreign power which controlled the mouth of the Mississippi, must necessarily

<sup>1</sup> In *Hepburn and Dundas vs. Ellzey* (1805), 2 Cranch, 445.

<sup>2</sup> President Lincoln occasionally used the word "Confederacy" as equivalent to the Union, or the United States.

<sup>3</sup> *United States vs. Bevens* (1818), 3 Wheaton, 337.

<sup>4</sup> *The American Insurance Company vs. Canter*, 1 Peters, 511. (1828.)

be considered the natural enemy of the United States.<sup>1</sup> Forty years later, when the acquisition of Texas was a national issue, its "re-annexation" was urged by Jackson, then an ex-President; by Polk, the Democratic candidate for the Presidency, and by their followers as a measure necessary to the adequate military defense of the country.

As early as 1810, the Court distinguished<sup>2</sup> between the jurisdiction of the United States over the territories and the jurisdiction of the States over their respective domains. The national government inherited the title which the confederacy possessed to the territory northwest and southwest of the Ohio. The title to these regions was derived from the States which made cession of Western lands, and with the cession of the soil there went the cession of the jurisdiction, though in some extent the right to the soil was retained by the State and the right of jurisdiction ceded.<sup>3</sup> Thus it followed that the jurisdiction of the United States to that portion of the public domain, not as yet organized in commonwealths, gave to Congress powers which were not exercisable with respect to the States. For this reason, among others, the slavery question became a national issue, for it involved the right of Congress to restrain or abolish slavery and the slave trade in the District of Columbia or in the Territories.

Had the Northwest and Southwest Territories been organized as States prior to the formation of the national government the ordinance of 1787 would probably never have been passed. It is not improbable, however, that even in that case the question of slavery would have arisen in the public domain soon after acquired across the Missis-

<sup>1</sup> Jefferson's Works, IV, 431. (April 18, 1802.)

<sup>2</sup> In *Sere et al. vs. Pitot et al.*, 6 Cranch, 332.

<sup>3</sup> For an account of the cession see Vol. I, pp. 229-230.

issippi. The question of the power of the national government to "control as to slavery in the Territories" was bound to rise sooner or later for climatic and industrial reasons. The ordinance of 1787 figured only as a powerful precedent when the question of the exclusion of slavery from the Missouri Territory arose, and later from the California country. The organic difference between a Territory and a State and the paramount authority of Congress to make laws which it might think necessary and proper for the government of the Territories proved in the evolution of democracy in America to be a sufficient opportunity for the triumph of freedom over slavery. But during the first half of the nineteenth century no court, State or Federal, laid down the principle that the national government possessed the power to restrain or abolish slavery either in the District of Columbia or in the Territories.

The decisions of the courts from the Revolution to the Compromise of 1850, and the entire political history of the period should be read in connection with the constitutional history of the time, and particularly as it was expressed in the Commonwealth constitutions. Those adopted during the eighteenth century did not expressly recognize the paramount authority of the United States, neither did those in force in 1850. The law of the paramount authority of the national Constitution, though explicitly laid down by the Supreme Court in Marshall's time and chiefly by him, did not find its way into the State constitutions until after 1865. But all through Marshall's time there was a power making for nationality in the country and no obstacle of State sovereignty or slavery could set aside its progress or prevent its ultimate triumph. The reason which led Chief-Justice Gibson, in 1845, to change his opinion of the functions of the American judiciary,—

"the experience of the necessity of the case,"—may be said to have been the reason for the ultimate triumph of the national idea. But long before its triumph in practical politics it had been authoritatively laid down, and for the first time, by the Supreme Court of the United States under Marshall.

The fundamental distinction between the Constitution of the Nation and that of any of the States was defined by the Supreme Court in 1833.<sup>1</sup> The national Constitution "was ordained and established by the people of the United States for themselves, for their own government and not for the government of the individual States." Each State established a constitution for itself, in which it provided such limitations and restrictions of the powers of its particular government as its judgment dictated. The government of the Union was supposed to be one best adapted to its situation and best calculated to promote its interests. The powers which the people conferred on this government were to be exercised by itself and the limitations of its powers were naturally and necessarily applicable to the government created by the instrument. They were such limitations of power as were granted in the instrument itself under "all distinct governments formed by different persons and for different purposes." Marshall applied the principle in this case in construing the fifth amendment as one that "must be understood as restraining the power of the general government; not as applicable to the States, and also not construing the provisions in the Constitution which limited the authority of the States."<sup>2</sup> The limitations of the States restrained their legislatures on subjects intrusted to the general government or those in which the people of all the States took an interest, and

<sup>1</sup> In *Barron vs. Mayor, etc., of Baltimore*, 7 Peters, 243 (1833).

<sup>2</sup> Article I, Section 10.



the Chief-Justice showed how each limitation prevented any confusion of the powers of the State legislature with those of Congress.

The first ten amendments were added at so early a period in our history as practically to be a part of the original instrument, and they were added for the express purpose of preventing the national government from exercising authority, as Marshall expressed it, "in a manner dangerous to liberty." These amendments, he said, contained no expression indicating the intention to apply them to the State governments. The limitations of State legislation made in the National Constitution were for the purpose of preventing the States from exercising powers of national character; thus the legislative powers of a State in the American Union are unlimited by the Constitution of the United States, except as to the exercise of National functions. The normal functions of a Commonwealth were in no wise disturbed by the adoption of a National Constitution. This decision made a practical definition of State rights,—which must not be confused with so-called State sovereignty,—and it as carefully guarded the rights of a State as it guarded the rights of a Nation. The decision was strictly in accord with one rendered eight years earlier in the Circuit Court of the United States for Pennsylvania,<sup>1</sup> by Mr. Justice Washington, in which he defined the privileges and immunities of citizens in the several States. These, he had no hesitation in saying, were to be construed as fundamental in their nature belonging of right to the citizens of all free governments and at all times to be enjoyed by the citizens of the States composing the Union.

The list which he made coincided exactly with those declared in the various Bills of Rights adopted in the eight-

<sup>1</sup> *Corfield vs. Coryell*, 4 Wash. C. C., 371.

eenth century, and none were abandoned during the period now in review. There was much reason in prefacing an American State constitution with a Bill of Rights, although long before the adoption of the Compromise of 1850, the privileges and immunities declared in them were commonly recognized to be a part of the law of the land and to be inseparably interwoven with our political institutions. But Washington's decision gave the weight of judicial authority to the claims which the Americans had put forth half a century earlier, and the decision itself well illustrates how a provision which at first may be only a matter of speculative philosophy, or a political claim or later a constitutional provision, will at last become, by judicial decision, a fundamental in government.

But the broad and catholic interpretation of human rights which this decision suggests was not that interpretation of them which is made in our day. The interpretation of the fundamental rights of a citizen of an American commonwealth in 1825, was limited in its scope to free white persons, as was soon afterward laid down in a North Carolina decision,<sup>1</sup> defining the "extent of the dominion of the master over the slave." Between freedom and slavery, so ran this decision, no parallel could be drawn. The end of slavery was the profit of the master, his security, and the public safety; the subjects of slavery, in his own person and within his posterity were doomed to live without knowledge, and without capacity to make anything their own, and to toil that another might reap the fruits. What moral considerations should be addressed to such a being as a slave, to convince him of what it was impossible that the most stupid must not feel and know could never be true,—that he was thus to labor according to a principle of nature, or duty or for the sake of

<sup>1</sup> *The State vs. Mann*, 2 Dev., 263 (1829).

his own personal happiness. Such services could only be expected from one who had no will of his own but who surrendered his will in implicit obedience to that of another. Such obedience was the consequence only of uncontrolled authority over the body. There was nothing else which could operate to produce the effect. The power of the master must be absolute in order to render the submission of the slave perfect. The judge confessed his sense of the harshness of this proposition and that "as a principle of moral right every person in his retirement must repudiate it; but, in the actual condition of things, it must be so." There was no remedy. This discipline belonged to the state of slavery, and could not be relaxed "without abrogating at once the rights of the master and absolving the slave from his subjection." It constituted the curse of slavery both to the bond and to the free portions of our population, but it was inherent in the relation of master and slave.

There might be particular instances of cruelty and deliberate barbarity, said the court, in which in conscience the law might properly interfere;<sup>1</sup> but the difficulty was to determine where a court might properly begin. Merely in the abstract it might well be asked which power of the master agreed with right. The answer would probably sweep away all of them, but the court could not look at the matter in that light. It was forbidden to enter upon a train of general reasoning on the subject. It could not allow the right of the master to be brought into discussion in courts of justice. The slave to remain a slave must

<sup>1</sup> The constitutions of most of the slave States expressly provided penalties for the cruel treatment of slaves and inculcated kindness in their masters. A typical provision of the kind occurs in the constitution of Georgia of 1798, Article IV, Section 12, which was copied with generous modification into other constitutions of Southern States.

be made sensible that there was no appeal from his master; that his power was in no instance usurped; but was conferred by the laws of man at least, if not by the law of God. The danger would be altogether too great if "tribunals of justice should be called upon to graduate the punishment appropriate to every temper and every dereliction of menial duty." It therefore disclaimed the power of changing the relation in which master and slave stood to each other.

This decision was handed down at a time when the free soil party was in its infancy. Eight years before, Martin Van Buren had announced in his inaugural address, that he went into the presidential chair the "inflexible and uncompromising opponent to every attempt on the part of Congress to abolish slavery in the District of Columbia against the wishes of the slave-holding States, and also with the determination equally decided to resist the slightest interference with it in the States where it exists."<sup>1</sup> The court was compelled to declare that so long as slavery existed, the dominion of the owner over the slave was "essential to the value of slaves as property; to the security of the master and of the public tranquillity; and as most effectually securing the protection and comfort of the slaves themselves." Thus none of the rights defined by Justice Washington as fundamental to the citizens of all free government could possibly be enjoyed by the slave.

This decision on the permanent and helpless condition of the slave in America was handed down during the early stages of that agitation in Tennessee, North Carolina and Pennsylvania, which culminated in them in the abrogation of the right of free men of color to vote, a right implied but not expressed in the constitutions of these States in the description of the voter as a person or inhabitant,

<sup>1</sup> March 4, 1837; Richardson III, 318. See pp. 413-414, ante.

and not as was usual in the State constitutions, as a free white man. In pronouncing the first fugitive slave law constitutional,<sup>1</sup> the Supreme Court of the United States<sup>2</sup> gave a somewhat strange definition of the status of slavery. Mr. Justice Story delivered the opinion. By the general law of Nations, he said, no Nation was bound to recognize the state of slavery as to foreign slaves found within its territorial domains, when it was in opposition to its own policy and institutions, in favor of the subjects of other Nations where slavery was recognized. Recognition was a matter of comity and not of right. "The state of slavery," said he, "is admitted to be a mere municipal regulation, founded upon and limited to the range of the territorial laws," from which consideration it followed, that if the Constitution had not contained this clause every non-slave holding State in the Union would have been at liberty to have declared free all runaway slaves coming within its limits and to have given them immunity and protection against the claims of their masters; a course which would have created the most bitter animosities and engendered perpetual strife between the different States. The clause, therefore, was of the last importance to the safety and security of the Southern States, and could not have been surrendered by them without endangering their whole property in slaves. It was accordingly adopted into the Constitution by the unanimous consent of the framers; a proof at once of its intrinsic and practical necessity. Thus the entire responsibility for the return of the fugitive slave rested upon the United States.

Mr. Justice McLean dissented from this opinion, holding that a State had the right to exercise its police power

<sup>1</sup> Act of February 12, 1793; Statutes at Large, Vol. I, 302.

<sup>2</sup> In *Prigg vs. Commonwealth of Pennsylvania*, 16 Peters, 539 (1842).

and to refuse to assist in returning a runaway slave, an opinion which the abolition party immediately utilized as a legal and constitutional basis for its doctrines. Chief-Justice Taney in dissenting from McLean's view, declared that it was obligatory upon the States to assist in delivering up the fugitive; thus anticipating the argument of Webster and other defenders of the Fugitive Slave act in the Compromise of 1850. The effect of this decision, and of that of the North Carolina court in 1829, and of similar decisions in other States, was in harmony with the laws of Congress and of the States and of the practice and prejudices of the country, and together with them wrought the complete exclusion of persons in slavery from any participation in the rights of citizens. Scarcely less complete was the exclusion of free persons of color. These could not serve in the army or navy of the United States, or in its civil service, or in the militia or the civil service of the States. They were a people without a country,<sup>1</sup> ever in danger of wandering or being forced back into slavery.

Almost contemporaneous with the North Carolina decision of 1829, on the nature of the State, the Supreme Court defined the status of the Indian tribes.<sup>2</sup> The Indian nations, said Marshall, had always been considered as distinct political communities, retaining their original natural rights as the undisputed possessors of the soil from time immemorial, with the single exception of that imposed by irresistible power which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region

<sup>1</sup> The status of free persons of color is narrated at length in my *Constitutional History of the American People, 1776-1850*, Vol. I, Chap. xii.

<sup>2</sup> In *Worcester vs. The State of Georgia*, 6 Peters, 515 (1823).

claimed: a restriction which European potentates imposed upon themselves as well as upon the Indians. The Constitution, by declaring that treaties made with them were a part of the supreme law of the land, had admitted their rank among the powers capable of making treaties. All intercourse between this Nation and the people of the United States was vested by our Constitution and laws in the National government. The Constitution excluded Indians from the basis of apportionment of representatives and direct taxation. Their civil and political rights depended upon whatever laws Congress might choose to enact. Though thus authoritatively defined to be independent Nations and distinct communities, the laws of the United States did not make provision for their naturalization; this privilege being limited to persons of the white race. Throughout the period in review, only one American Commonwealth, Wisconsin, made provision in its constitution for the inclusion of persons of Indian blood among the citizens of the State, and gave the right to vote to "civilized persons of Indian descent, not members of any tribe."<sup>1</sup> Throughout the period only eight States gave free persons of color the right to vote,<sup>2</sup> and in four of these the right was of short duration.

Thus the government of the people of the United States, and that of nearly every commonwealth, was understood, throughout this period to be exclusively for the white race, and persons of Indian or African blood, excepting in a

<sup>1</sup> 1848, Article III, Section 1.

<sup>2</sup> Massachusetts, 1780; New Hampshire, 1776, 1784, 1792; Vermont, 1776, 1786, 1791, 1793; New Jersey, 1776, but abrogated by act of Assembly November 16, 1807, and made permanent by the Constitution of 1844; New York, 1821-1846; Pennsylvania, 1776, 1790, but limited to free white persons by the Constitution of 1838; Tennessee, 1796, abrogated in 1834; North Carolina, 1776, abrogated in 1835.

few commonwealths, were legally incapable of becoming citizens of the United States. The legal presumption through all these years was, that every person of negro blood was a slave. The burden of proof that he was a free man ever rested upon him. All the departments of government, both State and National, the entire administration of the public business, excluded the African race from any participation in the fundamental rights of the citizens. The judgment of the majority of the American people seemed to be permanently made up that persons of color were entitled neither by the laws of nature, of society or of God to any participation in civil or political rights. It was against this strictly legal and constitutional conclusion that the Free Soil party and the Abolitionists protested. The natural and constitutional scope of the powers of Congress were examined by the court in 1824, when Chief-Justice Marshall handed one of the most important contributions to the science of representative government.<sup>1</sup>

The issue involved was the power of Congress to control commerce, and the authority of the State legislatures to enact laws affecting it. It was claimed by counsel that, prior to the formation of the Union, the States "were sovereign, completely independent and connected with each other only by a league." "This," said Marshall, "is true, but when these allied sovereignties converted their league into a government; when they converted their Congress or ambassadors, deputies to deliberate on their common concerns and to recommend measures of general utility, —into a legislature, empowered to enact laws on the most interesting subjects,—the whole character in which the States appeared underwent a change," the extent of which

<sup>1</sup> In *Gibbons vs. Ogden*, 9 Wheaton, 1; see also *Brown vs. Maryland*, 12 Wheaton, 419 (1827); the *License Cases*, 5 Howard, 504 (1846); the *Passenger Cases*, 7 Howard, 283 (1848).



could be determined only by a fair consideration of the instrument by which the change was effected. It authorized Congress to make laws necessary and proper for the purpose. But its limitation on the means which might be used was not extended to the powers which were conferred, nor was there one sentence in the Constitution which, so far as the Court could discern, prescribed this rule. A strict construction of the Constitution meant only a construction opposed to that enlarged one which would extend words beyond their natural and obvious import. If it signified that narrow construction, which in support of some theory not to be found in the Constitution, would deny to the government those powers which the words of the grant is usually understood imported, and which were consistent with the general views and objects of the instrument; if it stood for that narrow construction which would cripple the government and render it unequal to the objects for which it was declared to be instituted and to which the powers given, as fairly understood, rendered it competent, then, the court could not perceive the propriety of this construction nor adopt it as the rule by which the Constitution was to be expounded. "Commerce," continued Marshall, "undoubtedly is traffic, but it is something more, it is intercourse. It describes the commercial intercourse between Nations and parts of Nations in all its branches, and is regulated by prescribed rules for carrying on that intercourse."

"The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. An embargo might be a military instrument but might be resorted to with a simple view to commerce. The embargo act in Jefferson's time had been opposed chiefly by the Federalists, as unconstitu-

tional. Not because the act did not flow from the power of Congress to regulate commerce, but because the particular law in question was the annihilation and not the regulation of commerce. The language of the Constitution, continued the Chief-Justice, comprehends every species of commercial intercourse between the United States and foreign Nations. But did the power of Congress equally extend to commerce between the several States? "Commerce among the States," said he, "cannot stop at the external boundary line of each State but it may be introduced into the interior," and it might "very properly be restricted to that commerce which concerns more States than one." His conclusion was that, "the genius and character of the whole government seemed to be that its action is to be applied to all the external concerns of the Nation and to those internal concerns which affect States generally, but not to those which are completely within a particular State which did not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The complete internal commerce of the State, then, may be considered to be reserved to the State itself."

The power to regulate commerce might be exercised by Congress to its utmost extent and it acknowledged no limitations other than those prescribed in the Constitution. Thus the power of Congress over commerce was plenary and vested in it by the Constitution of the United States. The sole resort on the exercise of this power were "the wisdom and discretion of Congress, their identity with the people and the influence which their constituents possess at elections." But was the act of laying duties or imposts on imports and exports as authorized in the Constitution, a branch of the taxing power or of the power to regulate commerce? The court thought it very clear that it was

considered as a branch of the taxing power. But the power in Congress to levy taxes could never be considered as abridging the rights of the States on that subject, and they might consequently have exercised it levying duties on exports and imports had not these been prohibited by the Constitution. "In our complex system, presenting the rare and difficult scheme of one general government whose action extends over the whole, but which possesses only certain enumerated powers, and of numerous State governments which retain and exercise all powers not delegated to the Union, contests respecting power must arise. Were it otherwise the measures taken by the respective governments to execute their acknowledged powers would often be of the same description and might sometimes interfere." This, however, said Marshall, did not prove that the one was exercising or had the right to exercise the powers of the other. The framers foresaw this state of things and provided for it by declaring the supremacy, not of the Constitution, but of the laws made in pursuance of it.

To this day this remains the great decision on the scope and character of the legislative power under a written Constitution. So clearly did Marshall here prove the paramount authority of Congress to regulate commerce that it was easy by parity of reason to apply that power to the regulation of slavery, and some thoughtful persons long before its abolition had satisfied themselves that Congress had the right, not only to regulate but even to abolish slavery in the exercise of its power over commerce. This opinion, it will be remembered, was held by Webster at the time of the Missouri Compromise, and was embodied by him in the Boston memorial against slavery extension. In the bank decision,<sup>1</sup> Marshall not only sustained the

<sup>1</sup> *McCulloch vs. Maryland*, 4 Wheaton, 316.

constitutionality of the act creating the bank, but defined the destructive powers of taxation in the States and in Congress. The States are forbidden by the Constitution to lay duties on imports and exports, except what may be absolutely necessary for executing their inspection laws.

But the powers of the States to tax could not be exercised so as to destroy or tend to destroy the National government. "The sovereignty of a State," said he, "is subordinate to and may be controlled by the Constitution." The only security against the abuse of the taxing power is to be found in the structure of the government itself. A legislature in imposing a tax, acts upon its constituents, which, said Marshall, was in general "a sufficient security against erroneous and oppressive taxation." The State legislatures, in Marshall's time, possessed the unlimited right to tax. The State constitutions prescribed no limitations to the exercise of the right. "But the means employed by the government of the Union, said he, have no such security." Nor is the right of a State to tax them sustained by the same theory. Thus, the sovereignty of a State, he said, extended to everything existing by its own authority, but it did not extend to the means employed by Congress to carry into execution the powers conferred on that body by the people of the United States. "If we measure the power of taxation residing in a State by the extent of sovereignty which the people of a single State possess and conferred on its government, we have an intelligent standard applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a State unimpaired; which leaves to a State the command of all its resources and which places beyond its reach all these powers which are conferred by the people of the United States on the government of the Union, and all those means

which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the States and is safe for the Union. We are relieved, as we ought to be, from clashing sovereignties; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of the right in one government to destroy what there is a right in another to preserve. We are not driven to the perplexing inquiry so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the government of the Union in pursuance of the Constitution is itself an abuse because it is the usurpation of a power which the people of a single State cannot give.

The abuse in the case before the court arose in Maryland, which had imposed taxes on a branch of the United States bank. The supporters of the State sovereignty idea wished to prove that the government of the Union did not possess an indefinite power of taxation, and argued that otherwise, in time, the National government might deprive the States of the means of profit for their own necessities, and subject then entirely to the mercies of the National legislature.

But the argument in the *Federalist*, which was cited to prove the dangers of this indefinite power in Congress, was intended, said Marshall, to prove the fallacy of these very apprehensions.<sup>1</sup> "If the Federal government should overpass the just boundaries of its authority and make a tyrannical use of its powers," wrote Hamilton in the number of the *Federalist* here referred to, "the people, whose creature it is, must appeal to the standard they have

<sup>1</sup> The *Federalist*, Nos. XXX-XXXIII.

formed and take such measures to redress the injury done to the Constitution as the exigency may suggest and prudence justify.”<sup>1</sup> And again as to a supposition of repugnancy between the power of taxation in the States and in the Union, it cannot be supported in that sense which will be requisite to work an exclusion of the States. It is indeed possible that a tax might be laid on a particular article by a State, which might render it inexpedient that thus a further tax should be laid on the same article by the Union; but it is not implied a constitutional inability to impose a further tax. The quantity of the imposition, the expediency or inexpediency of an increase on either side would be mutual questions of prudence; but there would be involved no direct contradiction of power.

The particular policy of the national and of the State systems of finance might now and then not exactly coincide and might require reciprocal forbearance.<sup>2</sup> Marshall remarked, that had the authors of the *Federalist* been asked “whether they contended for that construction of the Constitution which would place within the reach of the States those measures which the government might adopt for the execution of its powers, no man, who has read their instructive pages, will hesitate to admit that their answer must have been in the negative.” The conclusion of the decision was, that the States have no power by taxation or otherwise to retard, impede, hinder or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.<sup>3</sup>

<sup>1</sup> *Federalist*, No. XXXIII.

<sup>2</sup> No. XXXIII.

<sup>3</sup> The taxing power of the States and that of the United States were further distinguished in 1829, in Marshall's decision of the question whether States and corporations could tax stock issued

It will be observed that these definitions of the taxing power simply distinguished between the taxing power of the States and that of Congress, a distinction which practically meant that the power of the States to tax was limited strictly to those subjects over which they had complete control, and that no tax could be levied by a State upon any function, agency or creation of the National government. None of these decisions limited the right of the State to tax within its own jurisdiction, there it was supreme and the power to tax was exercisable at the discretion of its legislature under whatever limits might be prescribed in its constitution. The eighteenth century State constitutions were almost wholly silent on the subject of taxation, but before 1850, some of the States had incorporated separate articles on taxation and finance in their constitutions.<sup>1</sup> One does not proceed very far in the constitutional history of the period now under review before he discovers that the general and practically unlimited grant of the power of taxation in the Constitutions in force, was greatly abused. During the last decade of the period the States in the Mississippi Valley began to limit the amount of State indebtedness,<sup>2</sup> and empowered their local governments, the townships and counties to regulate their own finance in the hope that abuses in taxation would be prevented through the familiarizing of the voters with the wants and financial condition of their own localities. By 1850 the articles on taxation and finance

for loans made to the National Government: *Weston et al. vs. The City Council of Charleston*, 2 Peters, 449; see also *Dobbins vs. The Commissioners of Erie County*, 16 Peters, 435.

<sup>1</sup> For an account of this innovation see my *Constitutional History of the American People, 1776-1850*, Vol. II, Chap. xv, and Index, "Taxation."

<sup>2</sup> See my *Constitutional History of the American People, 1776-1850*, Vol. II, 65, 120-124, 266, 440, 444-450.

in the newer constitutions<sup>1</sup> had evolved essentially into their modern form and content. In none of the new provisions, however, was there any limitation to the right to tax as original, and, to use a phrase of the time, a sovereign right. But the obvious purpose of the provisions on finance and taxation were to prevent further deficits in revenue; to prevent the conversion of public funds to private purposes without authority of law; to establish as far as possible, a uniform system of taxation and in general to make finance simple, efficient and systematic.

The bank controversy, as agitated in Jackson's time, involved many questions, and among them the issue of bills of credit. The Constitution forbade States to issue them. The principle involved in this prohibition was examined by Chief-Justice Marshall in 1830, in a decision to which, it had been well for the country, had the people strictly adhered.<sup>2</sup> He defined a bill of credit as "an instrument by which a State engages to pay money at a future day, thus including a certificate for money borrowed." But the words to emit bills of credit, said he, "conveys to the mind the idea of an issue of paper intended to circulate through the community for ordinary purposes as money, which paper is redeemable at a future day." This is the sense in which the term has always been understood. In the case before him, the denominations of the bills were from fifty to ten dollars, which fitted them for the purpose of ordinary circulation, moreover they were spoken of in the law of Missouri creating them<sup>3</sup> as a circulating medium.

It was contended that because they were not made a

<sup>1</sup> As in Iowa, 1846, Articles VII, IX; Illinois, 1848, Article IX; Michigan, 1850, Article XIV.

<sup>2</sup> 1830, *Craig et. al. vs. The State of Missouri*, 4 Peters, 410.

<sup>3</sup> June 26, 1821.



legal tender, they were not bills of credit in the sense of the Constitution. But Marshall brushed this subtle distinction aside. The prohibition in the Constitution was general and extended to all bills of credit, not to bills of a particular description. He recited, briefly, the history of paper money in the Colonies and in the States, showing that its great mischief consisted in its having been made a legal tender. Yet this quality was not an essential one or the only mischief resulting from such bills. It was "the issuing of them, the putting them into circulation which was the act of emission and forbidden by the Constitution. It was argued that to pronounce the act authorizing these bills unconstitutional would humiliate a sovereign State, and provoke grave dangers. To which Marshall bravely answered, that if the exercise of the jurisdiction which the Constitution and the laws of the United States imposed upon a court were calculated to bring on these dangers, or if it should be indispensable to the preservation of the Union and consequently to the independence and liberties of the States, the judicial department could listen only to the mandates of law "and tread only that path marked out by duty."

It would have been well for the country had no departure from this decision ever been made, but seven years later amidst the terrible excitement of the panic of 1837, the court made a subtle distinction between a State and a corporation, meaning a bank which issues bills of credit, holding that the notes on the bank which the commonwealth of Kentucky issued were not bills of credit, for they were not emitted by the State upon its credit but upon the credit of the funds of the bank. The bank was not the State nor its agent. It possessed no more power than was given to it in the act of incorporation, indeed, it was like a private person engaged in business. Even in

becoming an exclusive stockholder in this bank, the State imparted to it no attributes of sovereignty. Under its charter the bank had no power to emit bills having the impress of sovereignty, or which contained a pledge of its faith. It was a simple corporation "acting within the sphere of its corporate powers," and could no more transcend them than any other banking institution. The State as a stockholder bore the same relation to the bank as any other stockholder. Mr. Justice McLean delivered the opinion of the court. Its membership had greatly changed. Marshall was dead, and his associates who had held to his views, save Joseph Story, had also passed away. The character of the Court's decisions had suffered another change, the law of the Constitution was interpreted by another school of thinkers. McLean's decision in the Kentucky bank case coincided with the popular demand for State banks.<sup>1</sup> No more perfect description of a stable currency can be found in our literature than the concluding passage in McLean's opinion.

"The funds of the bank and its property of every description were held responsible for the payment of its debts and may be reached by legal or equitable processes. In this respect it can claim no exemption under the prerogative of the States. And if in the course of its operation its notes depreciate like the notes of other banks under the pressure of circumstances, still it must stand or fall by its charter. In this its powers are defined and its rights and the rights of those who gave credit to it are guaranteed; and even the abuse of its powers through which its credit has been impaired and the community endangered, cannot be considered in this case. We are

<sup>1</sup> He had delivered a dissenting opinion in the case of *Craig et al. vs. State of Missouri*.

of the opinion that the act incorporating the bank of the commonwealth was a constitutional exercise of power by the State of Kentucky, and consequently that the notes issued by the banks are not bills of credit within the meaning of the Federal Constitution."<sup>1</sup> The "wildcat" banks now had the authority of the Supreme Court of the United States to sustain them.

Marshall's opinions were bitterly assailed by the disciples of the Jeffersonian school. But they were based upon such a complete and serene understanding of the principles of our government that they were immovable. It is impossible now even to catch the spirit of that passion and prejudice which raged against them. Amidst this tumult Marshall calmly dared to interpret the law of the Constitution and continued in his unique task till the end. No brief summary of the greatest of his decisions can give an adequate conception of the debt which the American people owe to him. It has often been said that his opportunity was exceptional, and it will ever be said that he used his great powers to the full measure of his opportunity.

The literature of judicial decisions in all countries will be searched in vain for a more complete, scientific and practical conclusion than this at which he arrived. His conception of the law of the Constitution was as practical as it was profound and complete, and the supreme test of its utility has been its applicability to the wants of the Nation. He expounded the law of the Constitution without leaning one way or the other to accord to those general principles which usually govern the construction of fundamental laws.<sup>2</sup> With him the intention of the

<sup>1</sup> Mr. Justice Story's dissenting opinion.

<sup>2</sup> U. S. Bank vs. Deveaux, 5 Cranch, 87.

instrument ever prevailed.<sup>1</sup> And it still remains true that our knowledge of the law of the Constitution is chiefly derived from his exposition of it. So indelible was the impress of his mind upon the interpretation of the Constitution that the remarkable change in the personnel of the Court, which occurred shortly before the time of his death, and which transformed it into a school of interpreters whose opinions were almost antithetic to his own, could not obliterate his work. He had laid down the law of the Constitution forever. His distinguished successor, Chief-Justice Taney,<sup>2</sup> during the fifteen years which intervened from Marshall's death till the adoption of the great Compromise, handed down no decision which seriously controvened the law of the Constitution as Marshall had expounded it. There were minor adverse decisions<sup>3</sup> which indicated the attitude of the Court toward this law, but these could not supplant the great decisions of Marshall which had preceded them. A distinguished American jurist has well said of him, that his reasoning was lucid and suitable; his political insight profound; his courage splendid and tempered by judicial caution; his patriotism exalted; his character majestic.<sup>4</sup>

There were other forces, however, interpreting the law of the Constitution during these years, and these found utterance in the platforms of political parties. From an early day they appealed to the Constitution as their guide, but did not hesitate to put their own interpretation upon its meaning. Thus, in 1836, the New York Democrats, who supported the nomination of Martin VanBuren for

<sup>1</sup> *Ogden vs. Saunders*, 12 Wheaton, 332.

<sup>2</sup> Chief Justice, 1836-1864.

<sup>3</sup> *E. G. Briscoe vs. The Bank of Kentucky*, 11 Peters, 257 (1837).

<sup>4</sup> Henry Hitchcock, LL. D.; *The Constitutional Development in the United States as Influenced by Chief Justice Marshall*.

President, declared their unqualified hostility to bank notes and paper money as a circulating medium, "because gold and silver are the only safe and constitutional currency." They declared their hostility to monopolies, "because they violate the equal rights of the people, and hostility to the dangerous and unconstitutional creation, the vested rights or prerogatives by legislation," meaning thereby the United States Bank, which, it was declared, no legislature had a right to charter. But applying the principle of a common law, the act of 1861, incorporating the bank could be repealed by Congress and should be repealed when required by a majority of the people. Four years later at Baltimore, the party again nominated Van-Buren, and declared that the Federal government was one of limited powers which should be strictly construed; that the Constitution did not confer upon the general government the power to commence and carry on a system of internal improvements, neither did it authorize it to assume the debts of the States or to foster one branch of industry to the detriment of another nor to charter a United States bank, and it asserted with great energy that Congress had no power under the Constitution to interfere with, or to control the domestic institutions of the States, meaning slavery.<sup>1</sup>

These principles were reaffirmed four years later at the nomination of Polk and Dallas, with the addition that it was unconstitutional to distribute the proceeds of the public lands<sup>2</sup> among the States, but that they should be

<sup>1</sup> Platform of the Baltimore Convention, May 5, 1840.

<sup>2</sup> A curious case growing out of the Legislature of Maine of March 8, 1837, for distributing the surplus of the public money derived from the sale of land by the National Government; act of June 23, 1836, Statutes at Large, 552; came before the Supreme Judicial Court of the State in Hooper vs. Emery et al., 14 Maine, 375. The share assigned to Maine was apportioned by its Legis-

applied to the national objects specified in the national Constitution,<sup>1</sup> and were all repeated in 1848, at the time of the nomination of Cass and Butler.<sup>2</sup>

In the preceding year the first attack on the Constitution in a party platform was made by the Liberty party in nominating James G. Birney and Thomas Morris. The provisions of the Constitution which conferred external political powers on the owners of slaves and made two hundred and fifty thousand slave holders a privileged autocracy; and the provision for the reclamation of fugitive slaves from service were pronounced anti-republican in character and dangerous to the liberties of the people, and the party did not hesitate to demand that they be abrogated. It utilized McLean's recent dissenting opinion in the Supreme Court,<sup>3</sup> that the fugitive slave act of 1793, was unconstitutional, and demanded its immediate repeal. The party boldly asserted that it should treat the fugitive slave clause of the Constitution as utterly null and void, and as forming no part of the supreme law. The party further declared that the power given to Congress by the Constitution to provide for calling out the militia to suppress insurrections, did not make it the duty of the government to maintain slavery by military

lature among the towns of the State to be divided among the inhabitants of each town according to families. The question before the court was, whether the town of Biddeford could legally make such a distribution of its portion of the fund. The court held that the distribution under the act of the Legislature could only be recorded as a division of the money to the inhabitants of the town according to families, and that, by a division according to families must be understood a division per capita or by members. This distribution was ultimately made, the law being maintained in the following year in conformity with the decision.

<sup>1</sup> Baltimore Convention, May 27-29, 1844.

<sup>2</sup> Platform, Democratic Convention, Baltimore, May 22-26, 1848.

<sup>3</sup> In *Prigg vs. Pennsylvania*, 16 Peters, 539 (1842).

force, much less did it make it the duty of citizens to form a part of such a force.<sup>1</sup> The revolutionary character of these declarations is apparent when they are compared with the decision of the American courts and the constitutions and laws in force at the time.

The Liberty party seemed to both Whigs and Democrats, as a party sworn to destroy the government. Its members were looked upon as the anarchists of their day. In 1848, they declared that river and harbor improvements were objects of national concern and within the constitutional powers of Congress to make. Their anti-slavery statement was less revolutionary than before namely,—that slavery in the States depended upon State laws alone, which could not be repealed or modified by the Federal government, and for which it was not responsible, therefore, the party proposed “no interference by Congress with slavery within the limits of any State.” But they affirmed that the history of the country clearly showed that it was the settled policy of the Nation, as indicated by the adoption of the Ordinance of 1787, not to extend, nationalize or encourage, but to limit and localize and discourage slavery, to which policy the government ought to return. On this platform VanBuren and Charles Francis Adams were nominated for President and Vice-President.<sup>2</sup>

The Whigs at this time nominated Taylor and Fillmore, and devoted most of their platform to a eulogy of Taylor, but interpolated the declaration that the party stood “on the broad and firm platform of the Constitution, braced up by all its inviolable and sacred guarantees and compromises.”<sup>3</sup>

<sup>1</sup> Buffalo, August 30, 1833.

<sup>2</sup> Buffalo, Free Soil Convention, August 10-11, 1848.

<sup>3</sup> Platform of the Whig Convention, Philadelphia, June 7-8, 1848.

It is well not to impute too much importance to the ingenious sophisms of party platforms, but most of them bear unconscious testimony to the dominant notions of their day. Each party was seeking to give administrative utterance to the law of the Constitution, and when successful at the polls, interpreted its clauses as an exposition of a party policy. Its interpretation may be read, in part, in the statute book. The three great questions which arose during the first sixty years of the Constitution,—the tariff, the bank and internal improvements were included in Marshall's decisions, and the constitutionality of each was sustained. It is forgotten now, when these three issues have long been settled and have become a part of the fixed public policy of the country, that at one time they were mere propositions, abstract questions of right under the Constitution, and later, great issues between great parties. The practice of the country has sustained the principle at the base of each of them as laid down by Marshall. The enemies of the bank, of the protective system and of internal improvements would undoubtedly be amazed, could they return to the scene of their activities and witness the triumph of ideas which they so bitterly opposed. The Nemesis of politics at last overtook the cherished policy of the opponents of these distinctive features of American political institutions. More amazing was the fate of slavery, which delayed during the strident years, from the Revolution to the great Compromise, was only the more sudden when it came.

Our review of the law of the Constitution as laid down from the inception of the government to the adoption of the Compromise of 1850 prepares the way for the account of the repeal of that compromise and the events which led up to the abolition of slavery.



## CHAPTER IV.

### THE COMPROMISE REPEALED.

The discovery of gold on the Pacific coast in 1849 turned the tide of immigration into the West, and was one of the principal causes which led to the Compromise of 1850; but the insatiable demands of slavocracy soon forced its repeal. For a few years St. Louis was the principal point from which pioneers set forth for California, but by 1850 an overland route had been opened from Chicago through Iowa and the Nebraska country. Over the Nebraska region there was neither territorial nor State government. But many immigrants preferred to seek their fortunes among the rich bottom lands of Nebraska than to waste them in the gold mines, and in consequence many settlements sprang up along the Nebraska and Kansas rivers. By 1854 population there was sufficient to receive the attention of Congress, and a bill was introduced in the Senate to establish the territory of Nebraska. It was referred to the Committee on Territories, of which Stephen A. Douglas was chairman, and on the fourth of January he reported a substitute for the bill, of which the most important matter was its repeal of the compromise of 1820. It set up the ingenious theory that the Missouri Compromise was repealed by that of 1850; that the line  $36^{\circ} 30'$ , dividing free from slave soil west of the Mississippi, had been abolished, and that it was a disputed point whether slavery was prohibited in the Nebraska country by valid enactment. This was reviving the old question of the constitutional power of Congress to regulate the domestic institutions of the territories. While claiming no desire to enter into the discus-

sion of this controverted question, the committee made an exposition of the Compromise of 1850, which, it said, rested upon three propositions; that all questions pertaining to slavery in the territories and in new States to be formed from them were to be left to the decision of the people residing in them; secondly, that all cases involving title to slaves and questions of personal freedom were to be decided by local tribunals with the right to appeal to the Supreme Court of the United States; and thirdly, that the fugitive slave act of 1850 should be as faithfully executed in the territories as in the States.<sup>1</sup>

Douglas wished the Missouri restrictions on slavery declared inoperative and void, but his motion was lost, though the Senate struck out the passage in the original bill, that the Missouri restriction was superseded by the principle of the compromise of 1850. Not satisfied with this, Douglas, on the fifteenth of February, succeeded in substituting a provision that the Missouri restriction, the line of  $36^{\circ} 30'$ , was inconsistent with the Compromise of 1850, therefore, void; it being the true purpose of the Kansas-Nebraska bill, he said, neither to legislate slavery into the territory, nor to exclude it from it, but to leave the people free to regulate their domestic institutions in their own way, subject only to the Constitution of the United States. Senator Chase, of Ohio, attempted to amend further by adding that the people of the territory, if they saw fit, might prohibit slavery through their representatives, but this was rejected,<sup>2</sup> and instead, the Senate added a proviso that the bill should not be construed as putting in force any law which existed before the Missouri Compromise, either establishing or abolishing slavery.

<sup>1</sup> Senate report, Thirty-third Congress, first session, Vol. I, No. 15.

<sup>2</sup> March 2, 1854.

Senator Seward, who quickly detected in the bill a cunning device for establishing slavery in Nebraska, delivered a powerful speech against it; which in breadth and scope of its appeal for freedom equaled his speech against the Compromise of 1850. But his objections were overruled and the bill passed the Senate.<sup>1</sup> In the House a separate bill for Nebraska had been introduced in December,<sup>2</sup> but on the thirty-first of January, the Committee on Territories reported a bill organizing Kansas and Nebraska in one act. It was the Douglas bill in substance. An unsuccessful attempt was made to incorporate the doctrine of squatter sovereignty, by authorizing the inhabitants of the territories to determine the question of slavery for themselves. On the second of May, the House passed the bill, the majority in its favor being from slave States. It was sent to the Senate, which accepted it as a substitute for its own measure, passed it on the twenty-fourth and sent it to the President. He speedily approved it.<sup>3</sup> It extended the fugitive slave act over Kansas and Nebraska; declared the Missouri Compromise inconsistent with the principles of non-intervention by Congress with slavery in the States and territories as recognized by the Compromise of 1850, and left the question of slavery to be settled by the inhabitants of the territories in their own way.

While the bill was in Congress, the leaders of the party opposed to slavery in Nebraska, calling themselves, at the time, Independent Democrats, issued an appeal to the country protesting against the bill. This appeal was essentially to the higher law of the Constitution. While arraigning the bill as a menace to free institutions and

<sup>1</sup> March 3, 1854.

<sup>2</sup> December 22, 1853.

<sup>3</sup> May 30, 1854; *Statutes at Large*, X, 277.

a violation of the two great compromises on slavery which had been made, it did not rest its objections on these, but on the economic effects of the proposed law. The region to be affected by it was more than twelve times as great as that of Ohio. It occupied the very heart of the continent, and excluding California, was larger than all the existing free States. This was to be appointed to slavery. Its clear violation of the Missouri Compromise was in the face of the opinions of President Monroe and his cabinet, who, though most of them were from slave-holding States, had affirmed its constitutionality. The defenders of the bill claimed that the Nebraska territory sustained the same relations to slavery as did the territory acquired from Mexico prior to 1850, therefore, that the pro-slavery clauses of the bill were necessary to carry into effect the compromises of that year. This assertion, the protest declared, was groundless. The acts permitting slavery in the region acquired from France, Spain and Mexico, were never supposed to have abrogated or affected the existing exclusion of slavery from Nebraska. But the strength of the appeal did not lie in its claim that the bill would be unconstitutional, but in its portrayal of the economic evils which it embodied.

A railroad to the Pacific had already been proposed and two of the principal routes, the northern and the central, traversed the Nebraska territory. If slavery was allowed there, the settlement and cultivation of the country would be greatly retarded. Inducements to free laborers and immigrants would be almost destroyed. The cost of constructing the railroad would be increased and its prospective profits necessarily so cut down as to make its construction practically impossible. Even if the road was made, the difficulty and expense of keeping it up in

a country from which the energetic and intelligent masses were excluded would impair its value and usefulness.

It had long been confidently expected that emigrants from Europe and energetic and intelligent laborers from the older States would find homes in the new region; but if the bill should become a law, the blight of slavery would cover the land. Homestead laws which Congress might enact would be worthless, and immigration would cease, for free men, unless compelled by hard and cruel necessity, would not work beside slaves.

The far-reaching consequences of making Nebraska slave soil would be intensified by the relative location of the territory. It would be a continuation of Texas, Arkansas and Missouri extending northward to the national boundary, and dividing the free States of the East from those of the Pacific coast. By compelling the whole commerce and travel between the East and the West to pass for hundreds of miles through a slave-holding region in the heart of the continent, the slave power, supported by the power of the federal government, would be able to extinguish freedom and to make slavery national. The protest against the bill was an appeal for "equal rights and exact justice for all men." It was one of the first applications of the higher law in the interpretation of American politics.<sup>1</sup> It was signed by two Senators and four Representatives, and among the names were those of Salmon P. Chase, Charles Sumner, Joshua R. Giddings and Charles Smith.

While this protest had no effect in preventing the passage of the Kansas-Nebraska bill, the economic dangers of which it gave warning, were brought home to the consciences of thousands at the North. The South, too, was

<sup>1</sup> January 30, 1854; Congressional Globe, Vol. XXVIII, Thirty-third Congress, First session, part 1, p. 281.

active and two streams of population poured in to the Kansas-Nebraska country, one from the North, intent on excluding slavery; the other from the South determined to establish it in the new region. The immediate result was civil war in Kansas.

The repeal of the Compromise of 1850 by the Kansas-Nebraska act reopened the whole subject of slavery. The opponents of slavery extension, organized as a new party, the Republican, opposed the repeal, opposed the extension of slavery to the territories and demanded the admission of Kansas as a free State.<sup>1</sup> It nominated Fremont and Dayton for President and Vice-President. The Democratic party nominated Buchanan and Breckinridge, on a platform<sup>2</sup> that denied to Congress power under the Constitution to interfere with the domestic institutions of the States; adopted the Kentucky and Virginia resolutions as "one of the main foundations of its political creed" and demanded that slavery in a territory should be left wholly to its inhabitants to permit or to prohibit. The election gave the Presidency, the Senate and the House to the Democrats.<sup>3</sup> Buchanan had a majority of the electoral college and a plurality of the popular vote. Judging from the result, the American people approved the doctrine of non-interference, by Congress, with slavery, in State or Territory, or in the District of Columbia,

<sup>1</sup> Republican National Convention of 1856; Johnson's edition, pp. 43, 59.

<sup>2</sup> See official proceedings of the National Democratic Convention, held in Cincinnati, June 2-6, 1856; Cincinnati Inquirer Company, 1856, pp. 23-27. (The Cincinnati platform.)

<sup>3</sup> Buchanan and Breckinridge (Democratic) electoral vote, 174; popular vote, 1,838,169. Fremont and Dayton (Republican) electoral vote, 114; popular vote, 1,341,264. Fillmore and Donaldson (Know-Nothings) electoral vote, 8; popular vote, 874,534.

and also approved the doctrine of '98 as set forth in the Kentucky and Virginia resolutions.<sup>1</sup>

Between 1855 and 1860 four constitutions emanated from Kansas. Their particular history cannot be told here. It is sufficient that their successive provisions on slavery be cited as evidence of the gigantic effort, almost universal in the country at this time, to make slavery a national institution, and to put it beyond the reach of Congress. Kansas, before its creation as a territory, was a region of hostile populations: a northern, favoring free, a southern, favoring slave institutions. The first election resulted in a pro-slavery victory, won by the tactics of pro-slavery conspirators who had crossed the Missouri border to make Kansas secure. The legislature, chosen by fraud, persisted in assembling at Shawnee, and there hastily adopted the code of Missouri and enacted severe laws "to punish offences against slave property."<sup>2</sup> Eager to gather the rewards of power, exercised without scruple, the bogus legislature attempted to exclude all free-soil men from office, and to make it practically impossible for them to register their opinions at the polls.<sup>3</sup> But the free-State men were not to be excluded from the exercise of their rights in this summary manner. The legislature had expelled the free-State members. These returned to their homes and began a campaign which speedily bore fruit. On the fifth of September, 1855, the free-soil men met in

<sup>1</sup> Thirty-fifth Congress, first session, Dec. 7, 1857—Senate: Democrats, 39; Republicans, 20; Americans, 5. House of Representatives: Democrats, 131; Republicans, 92; Americans, 14. Thirty-sixth Congress, first session, Dec. 5, 1859—Senate: Democrats, 38; Republicans, 26; House of Representatives: Democrats, 101; Republicans, 113; Independents, 23.

<sup>2</sup> Kansas Statutes, 1855, 715.

<sup>3</sup> For the history of this Legislature see Nicolay and Hay's *Lincoln*, I, Chap. xxiii.

convention at Lawrence and nominated a delegate to Congress and prepared for a constitutional convention, to which delegates were later chosen in the free-soil districts, and which assembled at Topeka on the twenty-third of October. A constitution was adopted which forbade slavery<sup>1</sup> in the language of the Ordinance of 1787, and also made indentures with negroes and mulattoes, executed in another State, invalid; for there was no more disposition among the free-soil men of Kansas than among those of Ohio, Indiana or Iowa to suffer free negroes in their midst.<sup>2</sup> The constitution was submitted to the voters on the fifteenth of December, and its friends claimed that it was ratified by an overwhelming vote.<sup>3</sup> But the fate of the constitution is briefly told. With the petition for admission into the Union, this constitution was presented to Congress<sup>4</sup> and was supported by the Republican members of both Houses. In a special message, President Pierce pronounced it to be "of revolutionary character,"<sup>5</sup> devoted nearly half of his last annual message to a review of the slavery issue, and again pronounced the Topeka constitution an effort to erect a revolutionary government<sup>6</sup>. Finally, it was dismissed by the Senate Committee on Territories as the movement of a political party to overthrow the government instituted by Congress in

<sup>1</sup> Article I, Section 6.

<sup>2</sup> The hostility towards free negroes put the word "white" into constitutions North and South (excepting New Hampshire, Vermont, Massachusetts and New York), as a description of the voter. See my *Constitutional History of the American People, 1776-1850*, Vol. I, Chap. xii, and Vol. II, Chaps. xiii, xiv, xv.

<sup>3</sup> For it, 1,731 votes; against it, 46. Report of Congressional Committee, p. 22.

<sup>4</sup> March 24, 1856; *Globe*, 1856, 698. For a short history of this Constitution see Nicolay and Hay's *Lincoln*, Vol. I, Chap. xxiv.

<sup>5</sup> Richardson's *Messages and Papers of the Presidents*, 358. (Special message of Pierce, January 24, 1856.)

<sup>6</sup> Message of December 2, 1856; Richardson, V. 405.



the territory.<sup>1</sup> Pierce concluded his review of affairs in Kansas with the announcement of "the peaceful condition of things" there, and this, too, when a civil war was raging in the territory.<sup>2</sup>

In spite of ceaseless efforts to bring Kansas into the list of slaveholding States, the territory continued in its unsettled condition, claimed by both parties as their special province, but recognized by the pro-slavery party as practically lost to them, although the pro-slavery men had possession of the territorial government. In February, 1857, the legislature passed a bill calling a constitutional convention, with the intention of securing a pro-slavery constitution in this way, by proclamation. The territorial governor, Geary, vetoed it because it did not provide for its submission to the people; but the bill was passed over his veto. A bill, emanating in the Senate, to enable the territory to form a constitution, which should be submitted to popular vote, failed in the House.<sup>3</sup> Robert J. Walker, of Mississippi, at the earnest appeal of the President, accepted the governorship of Kansas, Buchanan assuring him that he favored the submission of the forthcoming constitution to popular vote. But this procedure was attacked by the Southern leaders, who advocated sending the constitution that might be framed, directly to Congress, without any reference to the voters.<sup>4</sup>

<sup>1</sup> Senate report No. 34, first session, Thirty-fourth Congress, 32. See also Nicolay and Hay's *Lincoln*, I, 429-430.

<sup>2</sup> The best account of this struggle is given in Nicolay and Hay's *Lincoln*, Vol. I, Chap. xxv, in which the principal authorities are cited.

<sup>3</sup> For a discussion of the question of the authority of a convention to promulgate a constitution, and the conflicting decisions of the courts on the point, see my *Constitutional History of the American People, 1776-1850*, Vol. II, 176-177.

<sup>4</sup> The best account of Walker's reasons for accepting; of the President's promises, and his late violation of them, is given by Nicolay and Hay in their *Lincoln*, Vol. II, Chap. vii.

The delegates assembled at Lecompton on September seventh, but adjourned on the twelfth, to meet on the nineteenth of October, as the general territorial election was to occur on October fifth and meantime the voice of public opinion might thus be heard. The free-soil men had refused to vote under the laws of the bogus legislature, but they now decided to take part in the October elections. The election was a free-soil victory, in spite of notorious frauds. But the Lecompton delegates, being already chosen, were all of the pro-slavery party. The constitution which they made was the last of its kind. The preamble declared Kansas to be "a free, independent and sovereign State," language never to be used again in the constitution of an American Commonwealth. "The right of property," declared the seventh article, "is before and higher than any constitutional sanction, and the right of the owner of a slave to such slave and its increase is the same, and as inviolable as the right of the owner of any property whatever." This declaration, also, was destined never again to be incorporated into an American constitution.<sup>1</sup> The remainder of the article on slavery was copied chiefly from the constitutions of Alabama, Georgia and Kentucky. "Free negroes," it was declared in the Bill of Rights, "shall not be permitted to live in this State under any circumstances," a provision scarcely differing from that to be found in the constitutions of all the States west of New York and Pennsylvania. The constitution, in its pro-slavery provisions, was the work of a bare majority.<sup>2</sup>

<sup>1</sup> See my Constitutional History of the American People, Vol. I, Chap. vi. "The First Struggle for Sovereignty."

<sup>2</sup> The convention, after an angry and excited debate, finally determined, by a majority of only two, to submit the question of slavery to the people, though at the last forty-three of the fifty delegates present affixed their signatures to the constitution,

At a second session, November seventh, forty-three delegates affixed their names to the instrument, which had originally gone out signed only by the president of the convention, John Calhoun, a radical pro-slavery man. The form of submission to popular vote was, the "constitution with slavery" and the "constitution with no slavery," and no man could vote who would not first swear to support it. Meanwhile the administration at Washington had changed its mind and was now opposed to the submission of the constitution to the people of the territory.<sup>1</sup> The document itself provided for the submission on the twenty-first of December, and also for a general election on the fourth of January, 1858. At the first election, which by the terms of the constitution, was under the control of Calhoun, he reported it carried with slavery, by an almost unanimous vote,<sup>2</sup> but evidence speedily showed that the election was almost wholly fraudulent.<sup>3</sup> At the January election, the vote stood, for the constitution with slavery, 24; for it without slavery, 138; against it wholly, 10,226. Buchanan sent the Lecompton constitution to Congress with a special message, on the second of February, declared the Topeka constitution and the legislature existing under it "a revolutionary government," "adhered to with treasonable pertinacity," but declared the Lecompton convention "according to every

Buchanan's first annual message (December 8, 1857), Richardson, V, 452. The best general account of the Lecompton constitution is given by Nicolay and Hay's Lincoln, Vol. II, Chap. vi. See the Report of the Covode Investigation, No. 648, H. R., first session, Thirty-sixth Congress, 93-325.

<sup>1</sup> See note 4, p. 526.

<sup>2</sup> As he reported, 6,142 for and only 589 against the Constitution. It is also reported 6,226 to 569. See Report of Select Committee of Fifteen, A. H. Stephens, chairman, in the H. R., March 10, 1858.

<sup>3</sup> Nicolay and Hay's Lincoln, II, 105.

principle of constitutional law—legally constituted and—invested with power to frame a constitution. They did not think it proper,” said he of the convention, “to submit the whole of this constitution to a popular vote, but they did submit the question whether Kansas should be a free or a slave State to the people. This was the question which had convulsed the Union and shaken it to its very center.”

Had the Topeka faction chosen to submit to the laws and vote, instead of suffering the election to pass by default, peace would have been restored to the distracted territory. Therefore, according to the President, they were to blame for the condition of things in Kansas. “I heartily rejoice that a wiser and better spirit prevailed among a large majority of these people on the first Monday of January, and that they did on that day vote under the Lecompton constitution for a Governor and other State officers, a member of Congress, and for members of the legislature. We may now reasonably hope that the revolutionary Topeka organization will be speedily and finally abandoned, and this will go far toward the final settlement of the unhappy differences in Kansas. If frauds have been committed at this election, either by one or both parties, the legislature and the people of Kansas, under their constitution, will know how to redress themselves and punish these detestable but too common crimes without any outside interference.” He then declared himself decidedly in favor of the admission of the territory under the Lecompton constitution, “thus terminating the Kansas question.” “This,” said he, “will carry out the great principle of non-intervention recognized and sanctioned by the organic act, which declares in express language in favor of “non-intervention by Congress with slavery in the States or territories,” leaving “the people

thereof perfectly free to form and regulate their domestic institutions in their own way, subject only to the Constitution of the United States."<sup>1</sup>

Evidently Buchanan had the Cincinnati platform in mind when he wrote this part of the message, for he had repeated its major premise on slavery. But this was not the President's first laudation of the Lecompton constitution. In his annual message, of the eighth of December preceding, he dilated on the excellencies of the instrument, its origin, its plan of submission, and its protection of slave property even if it was adopted without slavery. He declared it made according to "the plain principle" of "a confederacy of sovereign States," "finally decided by the highest judicial tribunal of the country." For Buchanan never suffered a chance to pass without referring to the Dred Scott decision as the finality of finalities in the history of slavery. The President's ardent defense of slavery, his more than lawyer-like advocacy of the rights of slaveholders even in free Kansas not only missed but went beyond the mark; it did more than merely to excite abolitionists: it alarmed many who hitherto had been stanch pro-slavery men. The slavery controversy was at this point when Senator Douglas began his campaign in Illinois for re-election, and the new Republican party nominated Abraham Lincoln against him. The famous Lincoln-Douglas debates followed, in which every principle of the slavery question was examined.

The Lecompton constitution was now before Congress. In the Senate, the Democratic majority easily passed a bill admitting the territory with this constitution; in the House, on the first of April, 1858, by a small majority, a new measure was substituted, that the constitution should again be submitted to a popular vote. If it was ratified,

<sup>1</sup> Richardson's Messages of the Presidents, V. 471-481.

the President, as in the case of Missouri, should admit the State by a proclamation. If the constitution was rejected, a new convention should be chosen and a new constitution framed. But this measure, the Senate not concurring, failed also. Intent on admitting the territory with the Lecompton constitution, the administration now brought about a new method of admission, known as the "English bill," which was carried, in the House, by the casting vote of the Speaker, James L. Orr, of South Carolina. This vote provided for a conference, which was moved by William H. English, of Indiana.<sup>1</sup> From the Conference Committee came the new bill, admitting Kansas on condition that it accept large land tracts. The vote "Proposition accepted" signified that the Lecompton constitution and the lands were accepted; if the vote should be, "Proposition rejected" the people of Kansas might provide for another convention and another constitution.<sup>2</sup> This unparalleled piece of bribery might satisfy Congress and the President. At the election, in Kansas, on the third of August, the vote of the people was, "Proposition rejected," by a majority of ninety-five hundred and twelve.<sup>3</sup> Again a convention assembled, this time at Leavenworth, on the twenty-fifth of March, 1858, having adjourned from a two-days' session at Mineola. In a week's session a constitution was framed, similar, in most of its provisions to that made at Topeka. This constitution was said to be premature, because the people of the territory had not expressly voted on the question of framing a new one.<sup>4</sup>

<sup>1</sup> Nominated for Vice-President by the Democratic party at Cincinnati, June 22-24, 1880.

<sup>2</sup> Statutes at Large, XI, 269.

<sup>3</sup> For the measure, 1,788; against it, 11,300.

<sup>4</sup> It was claimed by the supporters of this constitution that it was ratified, on the third Tuesday of May, 1858, by a vote of

Finally, in March, 1859, the people voted directly on the question and at Wyandotte, on the fifth of July, a convention assembled which in twenty-four days worked out a free-State constitution. The Leavenworth constitution had given the right to vote to every male citizen of the United States, and to men of foreign birth who had declared their intention to become citizens. The Wyandotte constitution restricted the suffrage to whites. The Topeka constitution had given it to civilized Indians, who had severed their tribal relations,<sup>1</sup> but the new constitution was not so liberal. Slavery was forbidden. On the fourth of October it was ratified,<sup>2</sup> and was sent to Congress with the familiar petition for the admission of the territory into the Union. Evidently, Kansas was forever lost to slavery. In spite of a vast and concerted effort to bring it into the Union as a slave State, and thus to carry out the doctrine of the Supreme Court in the Dred Scott decision, and the program of the radical slavocrats of the country, the people of Kansas had interposed their veto; and by the term, "people," meant those who had been described as revolutionists by two Presidents and who had been accused of treasonable pertinacity by one. That Kansas was free-soil was not due to the Courts of 4,346 for to 1,257 against it. Even Kansas Free Soilers were not yet ready to put a clause in a constitution giving the right to vote to "every male citizen of the United States."

<sup>1</sup> Art. II, Chap. II, taken from the constitution of Wisconsin, 1848, Art. III. "The Ohio constitution was by vote" (of the convention) "adopted as the model upon which to frame ours" (the Wyandotte constitution), but, to use the language of one of the members of the convention, who is at the present time upon our Supreme Bench, "the variances are numerous and natural."—MS. letter, Ed. Russell to John A. Jameson, Leavenworth City, February 24, 1864.

<sup>2</sup> Report No. 255 (Galusha A. Grow), March 29, 1860, House of Representatives, Thirty-sixth Congress, first session, p. 20; 10,425 votes for it, 5,530 against it.

the United States, nor to the President, nor to Congress, nor to the wishes of the political party in power at Washington and in the slaveholding States. It was due to the plain people of Kansas, the immigrants from free States who, after the repeal of the compromise of 1850, and after the Dred Scott decision had opened all the territories to slavery, presented themselves as the first barrier to the nationalization of slavery.

While the Kansas struggle was at its height, two free States were admitted into the Union: Minnesota, on the eleventh of May, 1858,<sup>1</sup> and Oregon, on the fourteenth of February following.<sup>2</sup> Both had been organized as territories while the Missouri Compromise was in force: Oregon, on the fourteenth of August, 1848, with a provision specially applying the anti-slavery clause of the Ordinance of 1787;<sup>3</sup> Minnesota, on the third of March, 1849, with no reference to slavery, other than the indirect one that the laws of Wisconsin were to apply to the new territory, subject to change by its legislature.<sup>4</sup> Both territories assembled in constitutional convention during the summer of 1857,—Minnesota, indeed, having two conventions, a Republican and a Democratic, each of which framed a constitution, the two constitutions finally, by conference and compromise, being merged into one and ratified by the people.<sup>5</sup> It forbade slavery and limited

<sup>1</sup> Statutes at Large, XI, 285.

<sup>2</sup> Id. 383.

<sup>3</sup> Id. IX, 329 (section 14).

<sup>4</sup> Id. 403.

<sup>5</sup> For the Democratic Convention see *The Debates and Proceedings of the Minnesota Constitutional Convention*, including the Organic Act of the Territory, with the Enabling Act of Congress, the Act of the Territorial Legislature Relative to the Convention, and the Vote of the People on the Constitution; Reported Officially by Francis H. Smith, Saint Paul; Earle S. Goodrich, Territorial Printer, Pioneer and Democrat office, 1857, pp. xix-685. See also the



the franchise to white men, although in both conventions an earnest effort was made to allow free negroes to vote. But the usual argument prevailed,—that the negro was created inferior to the white; that he could not become a citizen of the United States and that to give him the right to vote would encourage an undesirable population and greatly retard the progress of the State.<sup>1</sup> The Minnesota conventions agreed in allowing persons of Indian blood, who had adopted the habits of the whites, to vote, and also in giving the right to foreigners who had declared their intention of becoming citizens.

This last concession was felt to be necessary in order to enable the State to compete with its neighbors.<sup>2</sup> There were at this time not above one hundred free negroes, of voting age, in the territory<sup>3</sup> and its climate did not invite an "African invasion." Though willing to prohibit slavery, the people of Minnesota, like all their neighbors in other free States, had no love for the negro; they wished him justice, in the abstract, but preferred that other communities should admit him as a settler.<sup>4</sup> The

Journal, same imprint, p. 209. For the Republican Convention see *Debates and Proceedings of the Constitutional Convention for the Territory of Minnesota to Form a State Constitution Preparatory to Its Admission Into the Union as a State*. F. F. Andrews, Official Reporter to the Convention, Saint Paul; George W. Moore, Printer, Minnesotian office, 1858, pp. xviii-624.

<sup>1</sup> This is brought out in the various speeches on the elective franchise, the word "whites," etc., in both conventions. The attitude of the free States toward free negroes, the extension of the suffrage to them, etc., see my *Constitutional History of the American People*, Vol. I, Chaps. vii and xii, Vol. II, Chaps. vii-xiii.

<sup>2</sup> See references, last of preceding note.

<sup>3</sup> In 1860 the population of Minnesota was 172,123. Of these 259 were free colored, of whom 126 were males. Preliminary report eighth census, p. 267.

<sup>4</sup> The attitude of Oregon to the free negro was like that of California in 1849. See my *Constitutional History of the American People, 1776-1850*, Vol. II, Chaps. x, xi, xii.

Oregon convention submitted a constitution which the electors could accept or reject; which they could make slave or free, and which might be declared to include, or to exclude, free negroes. This constitution, as it left the hands of the convention, was silent as to slavery and free negroes. The popular vote on it, however, was a sign of the times: 4,093 ballots for the constitution; 5,079 against slavery, and 7,559 against free negroes.<sup>1</sup> It was the most complete *referendum* on slavery and free negroes yet made in any State. The overwhelming vote excluding free persons of color was none the less significant because there were scarcely a hundred of this objectionable class in the territory. Oregon, like other free States, dreaded a negro invasion, if political rights were conferred upon the despised race.<sup>2</sup>

From whatever point we approach American history, during these years, the terrible truth of Lincoln's words, spoken in 1857, while Oregon and Minnesota were about to assemble in convention and make free-State constitutions, becomes clearer. All the powers of the earth seemed rapidly combining against the black man, to aid in making his bondage universal and eternal. Though the States were increasing in number, they were greatly abridging his rights, by their laws and constitutions, and his ultimate destiny never appeared so hopeless as during the last three or four years.

State constitutions, judicial decisions, laws, State and national, the messages of Presidents and governors, speaking the policy of a powerful party,—all the agencies of

<sup>1</sup> The Journal of this convention was published by the State in 1882. The Debates are printed in Vol. VIII of The Portland Oregonian. The vote is taken from that paper for December 19, 1857.

<sup>2</sup> See note 4, p. 534.

government combined, were hostile to the African race and sedulously devising stronger laws and more elaborate decisions to declare the slave property, and the right of property to be before and higher than any constitutional sanction. And because the guarantees of slavery were not enough, seven States had declared the Union dissolved, and for the immediate reason that a man in Illinois had been chosen President, who had declared that, in his opinion, "this government cannot endure permanently half slave and half free," that he did not expect the Union to be dissolved, but that he did expect it to cease being divided. Hostility to the free negro in the North was as great as hostility to emancipation in the South. The vote against free negroes, in Oregon, indicated a racial antipathy that was not suggested by the secession ordinance of South Carolina, three years later.

The Compromise of 1850 was supposed to have settled all slavery agitation forever, but the recent election, and the late repeal of the Compromise itself, indicated that the subject was not at rest. Before the repeal, a case was on its way to the Supreme Court which was to lead to a judicial utterance, supposed by the friends of slavery, at the time, and, perhaps by the distinguished judge who uttered it, to fix forever the status of slavery in the United States. This decision of the Supreme Court was given two days after the inauguration of Buchanan.<sup>1</sup>

Dred Scott was the slave of an army surgeon, Dr. Emerson, a citizen of Missouri, who, in the course of military duty removed to Rock Island, in the State of Illinois, and later, to Fort Snelling, at the time in a part of the territory of Wisconsin, but now within the State of Minnesota. While at Fort Snelling, Dred Scott, with the consent of his master, married a negro woman who also had

<sup>1</sup> March 6, 1857; 19 Howard, 393.

been brought from Missouri. Two children were born to them in Wisconsin. In 1850 Dr. Emerson was again living in Missouri whither he had brought Scott and his family. The negro brought suit for the freedom of himself and family because he had lived in Illinois and Wisconsin which, by various legislative acts, were free soil.<sup>1</sup> The local court in St. Louis, following Lord Mansfield's decision in the case of *Somerset*,<sup>2</sup> and on the principle that the American States were to each other as foreign nations, decided that Scott and his family were free persons. Emerson promptly appealed the case to the Supreme Court of the State, which, in 1852, even more promptly reversed the lower court, declared that Missouri would recognize the laws of other States as it thought best, and would be guided by the policy of its own institutions. But there was a dissenting opinion by Judge Gamble, that Dr. Emerson, or any other person, who, knowing that slavery was prohibited in another State, took his slaves there, by his own act emancipated them. Soon after this decision, Scott and his family were sold to a citizen of New York, named Sandford, and Scott again brought suit for their freedom, this time in the United States Circuit Court at St. Louis.<sup>3</sup> The decision of this court, in May, 1854, pronounced them the property of Sandford. They then appealed to the Supreme Court of the United States. The case was twice argued before the Court, once in the spring of 1856, when it scarcely attracted atten-

<sup>1</sup> The ordinance of 1787 and act of 1789. Acts of May 7, 1800, for Indiana Territory; February 3, 1809 for Illinois Territory. Acts of March 4, 1814, for Indiana Territory, and its enabling act of April 19, 1816. Constitution of Indiana, 1816, Art. VIII. Enabling act for Illinois, April 18, 1818; Constitution of 1818, Art. VI.

<sup>2</sup> 15 Missouri, 581, et seq.: *The Negro Case*, 11 Harg. S. T., 340; *Somerset vs. Stewart*, Loft, 1.

<sup>3</sup> November 2, 1853; Nicolay and Hay's *Lincoln*, II, 63, note.

tion, and when, on account of the approaching Presidential election, the opinion of the Court was withheld. In December following, it was again argued, four successive days, and the counsel, enlarging the issue before them, argued the greater question whether the Constitution empowered Congress to exclude slavery from the Territories. This of course raised the constitutionality of the Ordinance of 1787, re-enacted in 1789; of the Missouri Compromise, and of all acts of Congress resting upon them.

The Court consisted at this time of nine justices, of whom four were from free and five from slave States.<sup>1</sup> Seven were Democrats. The long and bitter agitation of the slavery question had at last reached the Supreme judicial power, which straightway proceeded to show, by a body of individual opinions, as well as by the decision in the case, that it was the creature of politics as well as the expounder of the Constitution and the laws. That the decision of the Circuit Court of the United States, in Missouri, should be sustained, was agreed to by the majority of the judges, and Justice Nelson was directed to write the opinion. Following the practice of federal Courts in these decisions, that the decisions of State Courts of last resort shall, as far as possible be recognized as final, he decided that the decision in the Supreme Court of Missouri should stand, as the case had arisen in Missouri. Scott and his family were therefore slaves. But this brief decision and quiet conclusion of the case did

<sup>1</sup> Roger B. Taney, C. J., Maryland, 1836-1864; John McLean, Ohio, 1829-1861; James M. Wayne, Georgia, 1835-1867; John Catron, Tennessee, 1837-1865; Peter V. Daniel, Virginia, 1841-1860; Samuel Nelson, New York, 1845-1872; Robert C. Grier, Pennsylvania, 1846-1869; \*Ben. R. Curtis, Massachusetts, 1851-1857; \*Jas. A. Campbell, Alabama, 1853-1861.

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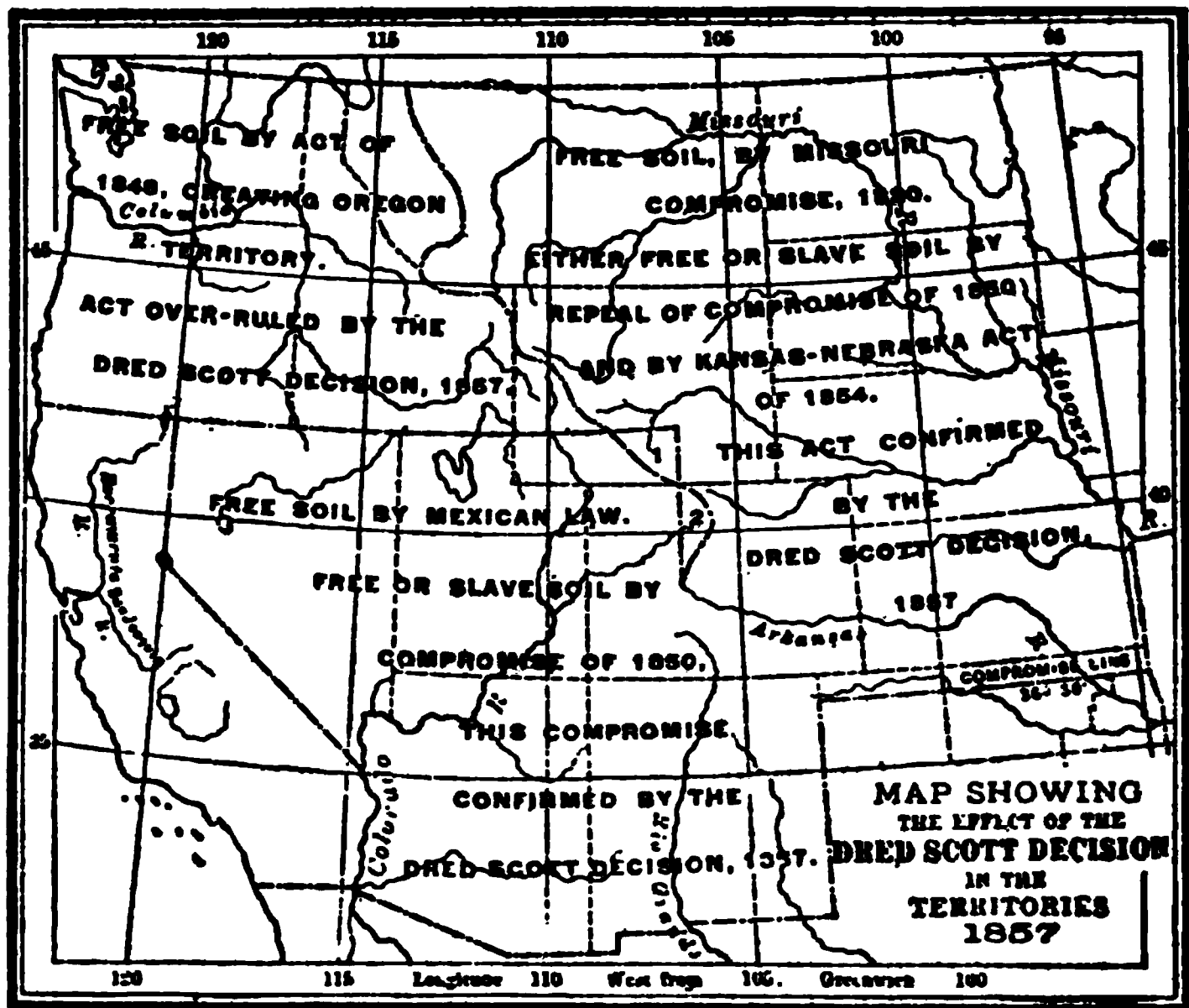
\*Resigned.

not satisfy all the judges. The questions involved went to the root of our institutions: could Congress constitutionally prohibit slavery in the territories? Why should not the Court settle the question forever? Why not give peace to the country? Why not put an end to party disputes? Not less fateful than the decision of the Court itself was this determination of its members to give an opinion on the political issues involved. Justice Nelson's brief disposition of the case was not enough. The Chief-Justice should hand down an opinion covering all the issues. Each justice wrote an individual opinion also. Thus there were as many opinions as members of the Court. But in the decision of Taney, that the Court had no jurisdiction in the case, though for different reasons, Campbell, Catron, Daniel, Grier, Nelson and Wayne mainly agreed; but Curtis and McLean differed wholly, and gave dissenting opinions.

While the judges were writing their opinions, the inauguration of Buchanan occurred, and in his address, the President stirred public interest, already great, in the case, by reference to the approaching decision. Kansas, said he, should be admitted into the Union, with or without slavery as its constitution might prescribe. "A difference of opinion has arisen in regard to the point of time when the people of a territory shall decide this question for themselves. This is, happily, a matter of but little practical importance. Besides it is a judicial question, which legitimately belongs to the Supreme Court of the United States, before whom it is now pending, and will, it is understood, be speedily and finally settled. To their decision, in common with all good citizens, I shall cheerfully submit, whatever this may be."<sup>1</sup> Two days later

<sup>1</sup> Messages and Papers of the Presidents, V, 431. (Buchanan's inaugural address.)

the decision was given. Slaves were property; they were not, in contemplation of law, citizens at the time of the Declaration of Independence and the formation of the Constitution. To the security of this form of property the government of the United States was pledged. Therefore all laws of Congress prohibiting slavery were unconstitutional. The Ordinance of 1787, re-enacted in 1789, was unconstitutional. The enabling acts for Ohio, Indi-



ana and Illinois; the Missouri Compromise, the enabling acts for Michigan, Iowa, Oregon and Wisconsin and much of the Compromise of 1850, were unconstitutional. The Constitution gave Congress power to protect and to extend slavery, but not to limit or to prohibit it. Though a domestic institution, its boundaries were those of the whole country. The Chief-Justice did not use the word Nation, for he held that "the United States were not for all pur-

poses a nation." The States were sovereign. Thus the Circuit Court of the United States, in Missouri, had no jurisdiction in the case. Dred Scott was property, not a person. He could not bring suit in any federal court. The State court of Missouri had decided against him: that ended the case. In one of the longest opinions in our reports, the Chief-Justice recited his interpretation of the earlier laws, constitution and decisions, and excluded the African race from all right to participate in the privileges of freemen. They were forever doomed to bondage, degradation and hopeless inferiority.

Curtis and McLean wholly dissented from this. "In five of the thirteen original States, colored persons," said Curtis, "then (that is in 1787) possessed the elective franchise,<sup>1</sup> and were among those by whom the Constitution was ordained and established. If so, it is not true in point of fact that the Constitution was made exclusively by the white race, and, that it was made exclusively for the white race, is, in my opinion, not only an assumption not warranted by anything in the Constitution, but contradicted by its opening declaration that it was ordained and established by the people of the United States for themselves and their posterity; and as free colored persons were then citizens of at least five States, and so in every sense part of the people of the United States, they were among those for whom and whose posterity the Constitution was ordained and established."<sup>2</sup> Taney had argued that the Declaration of Independence applied only to the white race. Curtis declared that it would not be just to its authors "nor true in itself, to allege that they

<sup>1</sup> New Hampshire, Massachusetts, New York, New Jersey, North Carolina. See my Constitutional History of the American People, 1776-1850. Index, "Free Negroes."

<sup>2</sup> 19 Howard, 582.



intended to say that the Creator of all men had endowed the white race exclusively with the great natural rights which the Declaration asserts."<sup>1</sup>

The opinion of Justice McLean was in the same spirit. "I prefer the lights of Madison, Hamilton and Jay," said he, "as a means of construing the Constitution in all its bearings, rather than to look behind that period into a traffic which is now declared to be piracy, and punished with death by Christian nations. I do not like to draw the sources of our domestic relations from so dark a ground. Our independence was a great epoch in the history of freedom; and while I admit that the government was not made especially for the colored race, yet many of them were citizens of the New England States, and exercised the rights of suffrage when the Constitution was adopted, and it was not doubted by any intelligent person that its tendencies would greatly ameliorate their condition. Many of the States on the adoption of the Constitution, or shortly afterwards, took measures to abolish slavery within their respective jurisdictions; and it is a well-known fact that a belief was cherished by the leading men, South as well as North, that the institution of slavery would gradually decline until it would become extinct. The increased value of slave labor, in the culture of cotton and sugar, prevented the realization of this expectation. Like all other communities and States, the South were influenced by what they considered to be their own interests. But if we are to turn our attention to the dark ages of the world, why confine our view to colored slavery? On the same principles white men were made slaves. All slavery has its origin in power and is against right."<sup>2</sup>

The dissenting opinions also considered the question of

<sup>1</sup> Id. 574.

<sup>2</sup> 19 Howard, 537.

the constitutionality of acts of Congress prohibiting slavery in the territories. Congress had power to establish territorial governments, under such conditions and subject to such limitations as it judged necessary and proper. This power it had exercised from the beginning of the government. "Here are eight distinct instances," continued Curtis, "beginning with the first Congress and coming down to the year 1848, in which Congress has excluded slavery from the territory of the United States; and six instances in which Congress organized governments of territories by which slavery was recognized and continued, beginning also with the first Congress, and coming down to the year 1822. These acts were severally signed by seven Presidents of the United States, beginning with General Washington and coming regularly down as far as Mr. John Quincy Adams, thus including all who were in public life when the Constitution was adopted. If the practical construction of the Constitution, contemporaneously with its going into effect, by men intimately acquainted with its history from their personal participation in framing and adopting it, and continued by them through a long series of acts of the gravest importance, be entitled to weight in the judicial mind on a question of construction, it would seem to be difficult to resist the force of the acts above adverted to."<sup>1</sup>

No decision thus far in our history provoked greater immediate public interest. It was a victory for State sovereignty and slavery. The Supreme Court had at last spoken. What higher authority existed in the Nation? Was not the slavery question finally set at rest? The decision went to an already divided public opinion. The Democratic party accepted it as a final settlement of the

<sup>1</sup> Id. 619.

whole matter. The Chief-Justice had decided according to law, the facts, and the principles of American government. Was not government in America exclusively for the white race? Let the laws and constitutions of twenty-seven of the thirty-one States answer. Did not the constitutions of all these twenty-seven explicitly declare that only whites were citizens? Even in the five States organized out of the old Northwest, and in Iowa and California,<sup>1</sup> both organized on free soil, only white men could be citizens. New York admitted the black man to citizenship, but fixed qualifications which established his inferiority.<sup>2</sup> New Hampshire, Vermont and Massachusetts suffered him to vote, but negroes were so few in those States that their treatment in them was exceptional, and

<sup>1</sup> N. Y. constitution 1821, Art. II; constitution 1846, Art. II. "The question of equal suffrage to colored persons was submitted separately for adoption in 1846 and rejected by a vote of 83,306 to 223,834. It was again submitted in 1860 with like result, the vote being 197,503 to 337,984." Hough, N. Y. Convention Manual, 1867, I, 50. "In the rejected constitutions of 1867 the question of requiring a property qualification for colored persons was decided, in 1869, in favor of such requirement by a vote of 282,403 to 249,802." Hough, American Constitutions, II, 74, note. The constitution of 1777 gave the right to vote to every male inhabitant of full age, residents of the county six months who possessed a freehold in the county valued at £20, or rented a tenement of the yearly value of 40s, and had been rated and paid taxes to the State, or who were freemen of the city of New York or Albany on or before October 14, 1775. These could vote for members of Assembly. To vote for a State Senator or Governor the elector must possess a freehold of the value of £100 (articles VII, X, XVII). The constitutions of 1821 and 1846 abolished property qualifications for white men, but prescribed for free men of color three years' residence, as against two for whites, and a freehold clear estate valued at \$250. (Art. II.)

<sup>2</sup> Numbers of Voters—Electors worth \$100 (\$250 or over) in land: 1790, 19,369; 1821, 100,490; 1846.\* Worth \$20 to \$100 (\$50 to

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\*In 1845 there were 42,321 persons of color in New York State, of whom 2,025 were taxed. Census, 1855, Albany, 1857, p. xiv.

could not be construed as a precedent for the other twenty-eight States in the Union. Even in States which forbade slavery, the free negro was considered and treated as an inferior;<sup>1</sup> he was excluded from schools, from the trades, from the professions, from the society of the superior race. There was a mournful truth in the words of the Chief-Justice, that for more than a century before the Declaration of Independence and the Constitution, the blacks had been "regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit."

Of opinions on the decision itself, those uttered by two men, at the time political opponents, may be said to express the divided sentiment of the Nation and to indicate whither the country was tending. These men were Stephen A. Douglas, United States Senator from Illinois, and lately a competitor with Buchanan for the Presidency; and Abraham Lincoln, also of Illinois, and now entering upon that great national campaign which resulted, four years later, in his inauguration as Buchanan's successor. "The material and controlling points in the case, those which have been made the subject of unmeasured abuse and denunciation," said Douglas, in a speech

\$250): 1790, 23,425; 1821, 8,985. Electors not freeholders, but renting tenements worth 40s (\$5): 1790, 14,674; 1821, 93,035. Other electors†: 1790, 138; 1821, 56,877‡. Totals: 1790, 57,606; 1821, 259,387; 1846, 550,673.

<sup>1</sup> See my Constitutional History of the American People, 1776-1850, Vol. I, Chapter xii.

†Freemen of New York or Albany on October 14, 1775, and April 20, 1777, respectively.

‡Non-freeholders who paid poll-tax, or served in the militia, or did exemption service to the State, under the law.

at Springfield, Illinois,<sup>1</sup> "may be thus stated: First, The court decided that under the Constitution of the United States, a negro descended from slave parents is not and cannot be a citizen of the United States. Secondly, the act of March sixth, 1820, commonly called the Missouri Compromise act, was unconstitutional and void before it was repealed by the Nebraska act,<sup>2</sup> and consequently did not and could not have the legal effect of extinguishing a master's right to his slave in that territory. While the right continues in full force under the guarantees of the Constitution, and cannot be divested or alienated by an act of Congress, it necessarily remains a barren and a worthless right, unless sustained, protected, and enforced by appropriate police regulations and local legislation, prescribing adequate remedies for its violation. These regulations and remedies must necessarily depend entirely upon the will and wishes of the people of the territory, as they can only be prescribed by the local legislatures. Hence the great principle of popular sovereignty and self-government is sustained and firmly established by the authority of this decision." Douglas had just pronounced this decision of the courts one that would stand in all future time a proud monument to the greatness of the judges who made it. But in drawing his own conclusions from the opinion, he was guilty, as has been pointed out by an eminent authority, of "a glaring *non sequitur*."<sup>3</sup> If Congress could not prohibit slavery from

<sup>1</sup> Nicolay and Hay's Lincoln, II, 83.

<sup>2</sup> "—It being the true intent and meaning of this act not to legislate slavery into any Territory or State, nor to exclude it therefrom, but to leave the people thereof perfectly free to form and regulate their domestic constitutions in their own way, and subject only to the Constitution of the United States."—Kansas and Nebraska act of May 30, 1854.

Statutes at Large, X, 283.

<sup>3</sup> Nicolay and Hay's Lincoln, II, 84.

a territory, how could a territorial legislature, the creation of Congress, prohibit it? Evidently the plain conclusion from the decision was that neither Congress nor a territorial legislature could do it. Douglas, the father of the "popular sovereignty" theory of the day, which his adversaries dubbed "squatter sovereignty," was making a desperate effort to save his theory from judicial destruction. His efforts cost him the loss of nearly every vote in his party, in 1860, in the slave-holding States.

Lincoln's opinion of the Dred Scott decision, given also in a speech at Springfield, Illinois, a few days after Douglas had spoken, gave voice to the belief of the young party of which he was the leader in the West and which was rapidly gathering strength and organizing throughout the free States. "That decision," said he, "declares two propositions—first, that a negro cannot sue in the United States courts; and, secondly, that Congress cannot prohibit slavery in the territories. It was made by a divided court—dividing differently on the different points. Judge Douglas does not discuss the merits of the decision, and in that respect I shall follow his example, believing I could no more improve on McLean and Curtis than he could on Taney. He denounces all who question the correctness of that decision, as offering violent resistance to it. But who resists it? Who has, in spite of the decision, declared Dred Scott free, and resisted the authority of his master over him? Judicial decisions have two uses—first, to absolutely determine the case decided, and, secondly, to indicate to the public how other similar cases will be decided when they arise. For the latter use they are called 'precedents' and 'authorities.' We believe as much as Judge Douglas (perhaps more) in obedience to and respect for the judicial department of government. We think its decisions on constitutional questions, when

fully settled, should control, not only the particular cases decided, but the general policy of the country, subject to be disturbed only by amendments of the Constitution as provided in that instrument itself. More than this would be revolution. But we think the Dred Scott decision is erroneous. We know the Court that made it has often overruled its own decisions, and we shall do what we can to have it overrule this. We offer no resistance to it. Judicial decisions are of greater or less authority as precedents according to circumstances. That this should be so, accords both with common sense and the customary understanding of the legal profession. If this important decision had been made by the unanimous concurrence of the judges, and without any apparent partisan bias, and in accordance with legal public expectation, and with the steady practice of the departments throughout our history, and had been in no part based on assumed historical facts which are not really true; or, if wanting in some of these, it had been before the court more than once, and had there been affirmed and reaffirmed through a course of years, it then might be, perhaps would be, factious, nay, even revolutionary, not to acquiesce in it as a precedent. But when, as is true, we find it wanting in all these claims to the public confidence, it is not resistance, it is not factious, it is not even disrespectful, to treat it as not having yet quite established a settled doctrine for the country."

So much for the value of the opinion: now as to its scope, meaning and consequences. "The Chief-Justice," Lincoln continued, "does not directly assert, but plainly assumes as a fact, that the public estimate of the black man is more favorable now than it was in the days of the Revolution. This assumption is a mistake. In some trifling particulars the condition of that race has been ameliorated; but as a whole, in this country, the change

between then and now is decidedly the other way; and their ultimate destiny has never appeared so hopeless as in the last three or four years.<sup>1</sup> In two of the five States—New Jersey and North Carolina—that then gave the free negro the right of voting, the right has since been taken away;<sup>2</sup> and in a third—New York—it has been greatly abridged;<sup>3</sup> while it has not been extended, so far as I know, to a single additional State, though the number of States has more than doubled.<sup>4</sup> In those days, as I understand, masters could, at their own pleasure, emancipate their slaves; but since then such legal restraints have been made upon emancipation as to amount almost to prohibition.<sup>5</sup> In those days legislatures held the unquestioned power to abolish slavery in their respective States;<sup>6</sup> but now it is becoming quite fashionable for State constitutions to withhold that power from the legislature.<sup>7</sup> In

<sup>1</sup> The increasing hostility toward free negroes, in all sections of the country, down to 1850, is recounted at length in my *Constitutional History of the American People, 1776-1850*, see index "Franchise," and "Negroes."

<sup>2</sup> N. J. Act of November 16, 1807.

N. C., 1835. Also Tennessee, 1834.

<sup>3</sup> See note p. 544.

<sup>4</sup> See discussion of extension of the franchise to free persons of color, Pennsylvania Constitutional Convention, 1838; N. Y., 1846; Iowa, 1847; Michigan, 1850, (given in my *Constitutional History of the American People*, Vol. II, Chapter IX) California, 1849 (see *Id.*, Chapter XI).

<sup>5</sup> The Kentucky Constitution of 1849-50, Art. X, and the more severe Virginia Constitution of 1850, (Art. IV, Secs. 19, 20, 21) are types. For an account of the Kentucky Constitution and slavery, see my *Constitutional History of the American People, 1776-1850*, Vol. II, Chapters I-VI.

<sup>6</sup> There were no restrictions on the Legislatures as to the emancipation of slaves in the State Constitutions, 1776-1800. For an account of legislative powers under them, see my *Constitutional History of the American People, 1776-1850*, Vol. I, Chapters II, III.

<sup>7</sup> See note 1, p. 549.



those days, by common consent, the spread of the black man's bondage to the new countries was prohibited; but now Congress decides that it will not continue the prohibition, and the Supreme Court decides that it could not if it would. In those days, our Declaration of Independence was held sacred by all, and thought to include all; but now, to aid in making the bondage of the negro universal and eternal it is assailed and sneered at, and construed and hawked at, and torn, till if its framers could rise from their graves they could not at all recognize it. All the powers of the earth seem rapidly combining against him. Mammon is after him, ambition follows, philosophy follows, and the theology of the day is fast joining the cry. They have him in his prison house, they have searched his person and left no prying instrument with him. One after another they have closed the heavy iron doors upon him, and now they have him, as it were, bolted in with a lock of a hundred keys, which can never be unlocked without the concurrence of every key; the keys in the hands of a hundred different men, and they scattered to a hundred different and distant places; and they stand musing as to what invention, in all the dominions of mind and matter, can be produced to make the impossibility of his escape more complete than it is. There is a natural disgust in the minds of nearly all white people at the idea of an indiscriminate amalgamation of the white and black races, and Judge Douglas evidently is basing his chief hope upon the chances of his being able to appropriate the benefit of this disgust to himself. If he can by much drumming and repeating, fasten the odium of that idea upon his adversaries, he thinks he can struggle through the storm. He therefore clings to this hope as a drowning man to the last plank. He makes an occasion for lugging it in, from the opposition to the Dred Scott

decision. He finds the Republicans insisting that the Declaration of Independence includes all men, black as well as white, and forthwith he boldly denies that it includes negroes at all, and proceeds to argue gravely that all who contend it does, do so only because they want to vote, and eat, and sleep, and marry with negroes. He will have it that they cannot be consistent else. Now I protest against the counterfeit logic which includes that because I do not want a black woman for a slave I must necessarily want her for a wife. I need not have her for either. I can just leave her alone. In some respects she certainly is not my equal, but in her natural right to eat the bread she earns with her own hands, without asking leave of any one else, she is my equal and the equal of all others.

“Chief-Justice Taney, in his opinion in the Dred Scott case, admits that the language of the Declaration is broad enough to include the whole human family, but he and Judge Douglas argue that the authors of that instrument did not intend to include negroes, by the fact that they did not at once place them on an equality with the whites. Now this grave argument comes to just nothing at all by the other fact that they did not at once or ever afterwards actually place all white people on an equality with one another. And this is the staple argument of both the Chief-Justice and the Senator for doing this obvious violence to the plain, unmistakable language of the Declaration.

“I think the authors of that notable instrument intended to include all men, but they did not intend to declare all men equal in all respects. They did not mean to say all were equal in color, size, intellect, moral development or social capacity. They defined with tolerable distinctness in what respects they did consider all men created equal—equal with ‘certain inalienable rights,

among which are life, liberty and the pursuit of happiness.' This they said and this they meant. They did not mean to assert the obvious untruth that all were then actually enjoying that equality, nor yet that they were about to confer it immediately upon them. In fact, they had no power to confer such a boon. They meant simply to declare the right, so that the enforcement of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence and augmenting the happiness and value of life to all people of all colors everywhere. The assertion that 'all men are created equal' was of no practical value in effecting our separation from Great Britain; and it was placed in the Declaration, not for that, but for future use. Its authors meant it to be, as, thank God, it is now proving itself, a stumbling block to all those who in aftertimes might seek to turn a free people back into the hateful paths of despotism. They knew the proneness of prosperity to breed tyrants, and they meant, when such should reappear in this fair land, and commence their vocation, they should find left for them at least one hard nut to crack."<sup>1</sup>

The events of the next three years hastened the impending revolution. Public sentiment was hopelessly divided. The old parties were broken up. The slavery issue, with its multifarious bearings and relations, dominated all others. The presidential election of 1860 was approaching.

On the eighteenth of May the Republican party, in National Convention at Chicago, nominated Abraham Lin-

<sup>1</sup> Speech of June 26, 1857. Lincoln's Works, I, 228-232.

coln for President, and Hannibal Hamlin of Maine for Vice President. The platform proclaimed the principles of the Declaration of Independence—and it may be said, by implication, as Lincoln had expounded it. The rights of the States should be maintained inviolate. The new dogma that the Constitution, of its own force, carried slavery into any or all of the territories of the United States was pronounced a dangerous political heresy, at variance with the explicit provisions of that instrument itself, with contemporaneous exposition, and with legislative and judicial precedent; and its tendency was declared revolutionary and subversive of the peace and harmony of the country. “The normal condition of all the territory of the United States,” so it continued, “is that of freedom.” Our Republican fathers, when they abolished slavery in the national territory, ordained that “no person should be deprived of life, liberty or property without due process of law.” “It becomes our duty, by legislation, whenever such legislation is necessary,” was the conclusion, “to maintain this provision of the Constitution against all attempts to violate it, and we deny the authority of Congress, of a territorial legislature, or of any individuals, to give legal existence to slavery in any territory of the United States.”<sup>1</sup>

The Charleston Convention, which met to name the Democratic candidate, split on the slavery issue. After struggling for three days to make a report, the platform committee agreed in reaffirming the platform on which Buchanan had been nominated and elected in the Cincinnati convention of 1856: That Congress had no power to interfere with the domestic institutions of the States;

<sup>1</sup> For an account of the conventions of 1860, see Nicolay and Hay's *Lincoln*, II, 227-279. See also Halstead's *Conventions of 1860*.

that the party would adhere to the principles of the Virginia and Kentucky resolutions, and to the doctrine of noninterference by Congress with slavery in State or territory, or in the District of Columbia.<sup>1</sup> But the committee was unable to make a unanimous report. The majority report, which its supporters declared represented seventeen States and one hundred and twenty-seven electoral votes, resolved that Congress had no power to abolish slavery in the territories; that no territorial legislature had power to prohibit the introduction of slaves nor to exclude slavery, nor to impair the right of property in slaves, and that it was the duty of the federal government to protect the rights of property wherever its authority extended.

The minority report, which its supporters declared represented fifteen free States and one hundred and seventy-six electoral votes, resolved that all questions involving rights of property, in States and territories, were judicial in character, and whatever the Supreme Court of the United States decided respecting them, the party would abide by.

William L. Yancey of Alabama, in an adroit, yet powerful speech, whose keynote was disunion, advanced the ultra-opinion of the hour. But the northern delegates, astounded at the boldness of the plan to which the South was now committing itself, found a voice in Senator George E. Pugh of Ohio, who, with equal boldness, declared that the northern delegates and the people they represented would not submit to the domination of slavery. When the majority and minority reports had been presented Benjamin F. Butler, a delegate from Massachusetts, proposed, as a middle course, that the Convention simply reaffirm the Cincinnati platform, but this sugges-

<sup>1</sup> See proceedings of the Cincinnati Convention, 1856, pp. 23-27.

tion, like his ingenious speech, which praised the platform of 1856 for its ambiguity, made little impression. After Yancey's speech and Pugh's reply, William Bigler of Pennsylvania attempted a compromise that should turn the control of the party over to the South, but his efforts ended somewhat unexpectedly in a vote that both platforms be recommitted, and that the committee make another attempt at compromise. This resulted in a second set of reports, substantially like the first. The majority wished Congress to intervene and protect slavery; the minority would abide by the final decision of the Supreme Court. By a vote of one hundred and sixty-five to one hundred and thirty-eight the Convention, on the thirtieth, adopted the minority report—the platform of the Douglas Democrat. This easily led to the resolution, now again offered, to reaffirm the platform of 1856. Immediately Yancey and his colleagues from Alabama, with the delegation from Mississippi, Florida, Texas, Louisiana, Arkansas and South Carolina, after declaring their inability to support the action of the Convention, formally withdrew, and most of them proceeded at once to complete the program to which they had long been secretly, and, some of them, like Yancey, openly engaged, of forming a Confederacy of the slave-holding States.

After the secession of the seven delegations the Convention, though fifty-seven ballots were taken, failed to nominate a candidate, the rules requiring a two-thirds vote of the full Convention to nominate. This ruled out Douglas, who at no time received more than one hundred and fifty-two and one-half votes. On the third of May the Convention adjourned to meet in Baltimore, on the eighteenth of June. The seceders, who, meanwhile, had organized as a convention in St. Andrew's Hall, after outlining their proposed course in various speeches, also adjourned,

having first agreed to reassemble on the eleventh of June, in Richmond.

On the ninth of May, at Baltimore, a new party, calling itself the Constitutional Union party, assembled in convention. It was a composite of old Whigs, of former Know-Nothings, of conservatives, who wished to avoid affiliation with the abolitionists, and of extreme slavocrats. They adopted as their platform, "no other political principle than the Constitution of the country, the Union of the States and the enforcement of the laws," and nominated John Bell of Tennessee, for President and Edward Everett, of Massachusetts, for Vice President. Possibly, the country being so much divided, the election might go to the House, in which case, Bell and Everett might be chosen as compromise candidates.

During this time the leaders of slavocracy had been active in Washington. An address prepared by them appeared, urging the Democratic party to support the Charleston seceders. This address, a caucus production and chiefly the work of Jefferson Davis, outlined the immediate program. If the coming Douglas convention at Baltimore failed to adopt a satisfactory platform, and to nominate a satisfactory ticket, the delegation to the Richmond convention and those to the approaching Baltimore convention, who might be dissatisfied with its action, should unite, and as they would form a majority, they should adopt a platform and nominate candidates with the assurance that they represented the majority of the electoral vote. The sharp debate between Douglas and Jefferson Davis in the Senate, early in May, over Davis's caucus resolutions,<sup>1</sup> showed clearly enough that behind the "simple declaration that negro slaves are property" and the "recognition of the obligation of the Fed-

<sup>1</sup> Congressional Globe, March 1, 1860, p. 935.

eral Government to protect that property like all others," there was a widespread understanding between Southern leaders in Congress and other leaders in slave-holding States that the recognition of these claims would only carry forward to completion the now swiftly maturing plan for a Southern Confederacy. When the Davis resolutions passed, the platform of the extreme slavocrats was thereby announced.

On the eighteenth of June the Douglas convention assembled at Baltimore, and with it met the Richmond seceders, who put in their claim of right to membership. But each delegation that had seceded met a contesting delegation from its own State, elected in answer to the call of the Douglas men before they had adjourned at Charleston. Again the convention divided and the Davis program was strictly carried out. Seven delegations, more or less affected by the Davis doctrine, withdrew on the twenty-third, Caleb Cushing, of Massachusetts, the chairman, going with them. The Douglas convention then, on the first ballot, nominated its candidate, with Herschel V. Johnson as Vice President. The Richmond seceders, with equal promptness, organized and nominated John C. Breckinridge of Kentucky, and Joseph Lane of Oregon, on a platform affirming the equal right of all citizens to settle with their property in a territory without any impairment of rights by Congress or territorial Legislature, and the obligation of the federal government to protect all rights of the citizens, to permit them, when the numbers warranted, to form a State constitution, at which point in their history the right of sovereignty began. The State then ought to be admitted, whatever its constitution might provide as to slavery.<sup>1</sup> The Douglas platform, after declaring that the Democratic party was not in ac-

<sup>1</sup> This was, in substance, the Davis caucus resolution.



cord "as to the nature and extent of the powers of a territorial legislature, and as to the powers and duties of Congress under the Constitution over the institution of slavery within the territories," affirmed that the party would "abide by the decisions of the Supreme Court" on the issues involved. Thus the doctrine of popular sovereignty was for a time to be in suspense till either public opinion acquiesced in its interpretation by Douglas or the Supreme Court should hand down a final decision regarding it.

Political platforms are not always safe foundations for conclusions regarding parties, but, allowing for the brevity, ambiguity or obscurity of the platforms of 1860, it is evident that the country was hopelessly divided on the question of the power of Congress over slavery in the territories. The Dred Scott decision made slavery the law, freedom the exception. The three factions of the Democratic party agreed in accepting this decision as final. But the Republicans, following the suggestion of Lincoln, when first he reviewed the decision, believed it was erroneous and should be reversed. So they cited as part of their political faith the fifth Amendment to the Constitution, that "no person should be deprived of life, liberty or property, without due process of law." Therefore, legislation should be initiated that would prevent the extension of slavery into the territories. This indicated the fixed purpose of the party to bring about a reversal of the decision. Nor was this merely a campaign threat. It meant that in the event of the election of Lincoln the Supreme Court might be reorganized either by enlarging its membership or, as several of its members were aged men, by the appointment of successors in political sympathy with Republican doctrines. The election, on the sixth of November, was a political revolution. Lincoln and Ham-

lin received a majority of the electoral votes and a plurality of the popular vote.<sup>1</sup> Nor was this all. The Congress that would assemble after the fourth of March, 1861, would have a Republican majority in both branches.<sup>2</sup> Meanwhile South Carolina and other Southern States had been carrying out a program of secession.

<sup>1</sup> Lincoln and Hamlin, electoral vote, 180; popular vote, 1,865,913; Breckinridge and Lane, electoral vote, 72; popular vote, 848,404; Bell and Everett, electoral vote, 39; popular vote, 591,900; Douglas and Johnson, electoral vote, 12; popular vote, 1,374,664.

<sup>2</sup> Thirty-seventh Congress, 1st Session, assembled July 4, 1861. Senate—Democrats, 11; Republicans, 31; Americans, 7.\* House of Representatives—Democrats, 42; Republicans, 106; Americans, 28.†

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\*One vacancy.

†Two vacancies.



## CHAPTER V.

### SECESSION.

On the seventeenth of December, 1860, a Convention assembled in Columbia, South Carolina, ostensibly to choose presidential electors, but really for the purpose of passing an ordinance of secession. This State was the only one, in 1860, whose presidential electors were chosen by the legislature. A week after the election of Lincoln the legislature passed the act calling the Convention. On the twentieth of December the ordinance of secession was passed unanimously.<sup>1</sup> A Committee of Seven was appointed to draw up a "declaration of causes inducing and justifying the secession of the State," which was discussed and passed four days later. At the same time an "Address of the People of South Carolina and to the People of the

<sup>1</sup> AN ORDINANCE to dissolve the Union between the State of South Carolina and other States united with her under the compact entitled "The Constitution of the United States of America."

We, the People of the State of South Carolina, in Convention assembled, do declare and ordain, and it is hereby declared and ordained,

That the Ordinance adopted by us in Convention, on the twenty-third day of May, in the year of our Lord one thousand seven hundred and eighty-eight, whereby the Constitution of the United States of America was ratified, and also all Acts, and parts of Acts, of the General Assembly of this State, ratifying amendments of the said Constitution, are hereby repealed; and the Union now subsisting between South Carolina and other States, under the name of "The United States of America," is hereby dissolved.

Journal of the Convention, p. 44.

The Ordinance was prepared by a Committee of Seven (Journal, p. 23) consisting of John A. Inglis, R. B. Rhett, James Chestnut, Jr., James L. Orr, Maxey Gregg, B. F. Dunkin, and W. F. Hutson. Rhett had served in the State Legislature, 1826; as Attorney-

General of the State, 1832; as a Representative in Congress, 1838-1849; in U. S. Senate, 1850-1. He is said to have been the first man to advocate secession and the dissolution of the Union, in a speech in Congress. Chestnut had served in the State Legislature, lower House, 1852; upper, 1854-8; appointed to U. S. Senate, December 4, 1857, and elected to fill the term ending March 3, 1865, but retired, November 10, 1860. James L. Orr served in the State Legislature, 1844-45; in Congress, 1848-60, serving as Speaker of the House during the 35th (December 7, 1857-March 3, 1859).

Ordinances of secession, similar to that of South Carolina, were passed by Mississippi, January 9, Florida, January 10, Alabama, January 11, Georgia, January 19, Louisiana, January 26, Texas, February 1, 1861.

The Mississippi convention by a vote of seventy to twenty-nine refused to submit the ordinance to popular vote. L. Q. C. Lamar was chairman of the committee reporting the ordinance; it was carried by a vote of 84 to 15.

Journal of Convention, 11, 15, 16.

In the Georgia convention, on the 18th of January, a resolution to secede and to co-operate in forming a Southern Confederacy was offered, also an elaborate substitute for pacification and constitutional guarantees similar to those suggested by the minority in the Alabama Committee of Thirteen. A vigorous debate followed which was interrupted by a call for the "previous question"; this was sustained by the Chair and the convention was brought to a direct vote on secession as provided in the resolution first offered; the vote stood 166 to 130, that an ordinance be prepared and a committee of seventeen was appointed to draw up the resolution. E. A. Nisbet was chairman and Robert Toombs, Alexander H. Stephens, D. P. Hill and A. H. Colquitt were members of this committee. The ordinance was reported on Saturday, the 19th, and passed by a vote of 208 to 89.

Journal of the Convention, 15, 20, 23, 31, 35.

On the 10th of December, 1850, the State Convention of Georgia met in Milledgeville and passed resolutions on the issues of the day. The Constitution of the United States was declared to be "in its terms, a bond of political union between separate sovereignties"; a "compact" involving "a high moral obligation," the protection of the institution of slavery; the States were a "confederacies." (Journal, 15.) The abolition of slavery by Congress in places within slaveholding States purchased for Federal purposes; the exclusion of slaves from Utah and New Mexico; the repeal or material modification of the fugitive slave

laws; or any action of Congress on the subject of slavery in the District of Columbia incompatible with the domestic tranquillity of the rights of the slaveholding States, "the State of Georgia will and ought to resist even (as a last resort) to a disruption of every tie which binds her to the Union." (Journal, 19.) Resolutions declaring the right of each State to secede, "in virtue of its independency and sovereignty" if it thought the step necessary, offered as a substitute for the report of the special committee, were voted down. (Journal, 31, 32.)

The Louisiana convention passed the ordinance of secession by a vote of 112 to 17, and, immediately after, unanimously passed a resolution recognizing the free navigation of the Mississippi and its tributaries "by all friendly States bordering thereon," and "the right of egress and ingress of the mouths of the Mississippi by all friendly States and powers" and declared a willingness to enter into stipulations to guarantee the exercise of these rights. (Journal of the Convention, 17, 18.)

The ordinance was drawn up by a Committee of Fifteen of which John Perkins, of Madison parish, was chairman. It reported on the 24th, when two substitutes were offered, one calling for a general convention of the slaveholding States at Nashville, Tennessee, on the 25th of February, a second, that attempts of the Federal Government to coerce any State that had seceded would be regarded by Louisiana as an act of war upon all the slaveholding States. A resolution to submit the secession ordinance to popular vote was lost by a vote of 84 to 43. (See the Journal, pp. 6, 10, 11, 17.)

The secession ordinance of Mississippi may be contrasted with the fourth resolution adopted by the people of Mississippi in convention assembled as expressive of their deliberate judgment on the great question involved in the sectional controversy between the slaveholding and non-slaveholding States of the American Union,

"That, in the opinion of this Convention, the asserted right of secession from the Union, on the part of a State or States, is utterly unsanctioned by the Federal Constitution, which was framed to "establish" and not to destroy the Union of the States, and that no secession can, in fact, take place without a subversion of the Union established, and which will not virtually amount in its effects and consequences to a civil revolution."

Journal of the Convention of the State of Mississippi and the Act Calling the Same, with the Constitution of the United States, and Washington's Farewell Address. Jackson: Thomas Palmer, Convention Printer, 1851, pp. 47-8.

Slave-holding States" was adopted. Though South Carolina was followed speedily by neighboring States, which passed similar articles and ordinances, those of South Carolina were not only first, but were the generic type of the opinions and reasons which, as State measures, and distinct from the individual schemes of disunionists in Washington, animated the secession movement.<sup>1</sup>

The struggle for the right of self-government, in 1776, so runs the South Carolina address, resulted in a declaration by the thirteen colonies that they were and of right ought to be "free and independent States." They declared themselves absolved from all allegiance to Great Britain, and, in pursuance of the Declaration, "each of the thirteen States proceeded to exercise its separate sovereignty; adopted for itself a Constitution;" organized a government, and in 1778 all "entered into a League known as the Articles of Confederation, whereby they agreed to entrust the administration of their external relations to a common agent, known as the Congress of the United States, expressly declaring in the first Article 'that each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right which is not, by this Confederation, expressly delegated to the United States in Congress assembled.' " Under this Confederation the war of the Revolution was carried on. The contest ended on the third of September, 1783, and Great Britain acknowledged the independence of the colonies, treating

<sup>1</sup> See also: A Declaration of the Immediate Causes which Induce and Justify the Secession of the State of Mississippi from the Federal Union, in Journal of the State Convention, and Ordinances and Resolutions, Adopted in January, 1861, with an Appendix. Published by Order of the Convention, Jackson, Miss.: E. Barksdale, State Printer, 1861, pp. 86-88. Also published in pamphlet form, with an address, and the secession ordinance of the State, Jackson: Mississippian Book and Job Printing Office, 1861, 8 pp.

with each as a "free, sovereign and independent State."<sup>1</sup> "Thus were established the two great principles asserted by the colonists; the right of a State to govern itself, and the right of a people to abolish a government when it becomes destructive to the ends for which it was instituted. Concurrent with the establishment of these principles was the fact that each colony became, and was recognized by the mother country as a free, sovereign and independent State."

"In 1787, deputies were appointed by the States to revise the Articles of Confederation, and on the seventh of September these deputies recommended, for the adoption of the States, the Articles of Union, known as the Constitution of the United States. The parties to whom this Constitution was submitted were the several sovereign States; they were to agree or disagree, and when nine of them agreed the compact was to take effect among those concurring, and the general government, as their common agent, was then to be invested with their authority. If only nine of the States had concurred the other four would have remained as they then were, separate, sovereign States, independent of any of the provisions of the

<sup>1</sup> Treaty of 1783, Art I.

Treaties and Conventions of the U. S., 376.

The question was not raised in the South Carolina Convention whether the mention of the States in the treaty as "sovereign" made them so. A descriptive title in the treaty, and by its plenipotentiaries, could not fix the status of members of the American Union. Their status as to sovereignty was determined by the Constitution of the United States and the administration of the government formed under it. The British treaty could recognize the independence of the United States, but it could not consider the status of the Commonwealths in their domestic and interstate relations. If the treaty had described the States as having divested themselves of sovereignty, would it have been cited as final authority on State sovereignty?



Constitution. In fact, two of the States did not accede to the Constitution until long after it had gone into operation among the other eleven, and during that interval they each exercised the functions of an independent nation.

“By this Constitution, certain duties were imposed upon the several States, and the exercise of certain of their powers was restrained, which necessarily implied their continued existence as sovereign States. But to remove all doubt, an amendment was added which declared that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.<sup>1</sup> On the twenty-third of May, 1788, South Carolina, by a convention of her people, passed an ordinance assenting to this Constitution, and afterwards altered her own Constitution to conform herself to the obligations she had undertaken.” Thus was established, by compact between the States, a government, with defined objects and powers, limited to the express words of the grant. This limitation left the whole remaining mass of power subject to the clause reserving it to the States or to the people, and rendered unnecessary any specification of reserved rights. We hold that the government thus established is subject to the two great principles asserted in the Declaration of Independence; and we hold, further, that the mode of its formation subjects it to a third fundamental principle, namely, the law of compact. We maintain that in every compact between two or more parties the obligation is mutual; that the failure of one of the contracting parties to perform a material part of the agreement entirely releases the obligation of the other, and that where no arbiter is provided each party is remitted to his own judg-

<sup>1</sup> See pp. 199 et seq.

ment to determine the fact of failure, with all its consequences.

“In the present case that fact is established with certainty. We assert that fourteen of the States have deliberately refused, for years past, to fulfill their constitutional obligations, and we refer to their own statutes for the proof. The Constitution of the United States, in its fourth article, provides that ‘No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.’ This stipulation was so material to the compact that without it that compact would not have been made. The greater number of the contracting parties held slaves, and they had previously evinced their estimate of the value of such a stipulation by making it a condition in the ordinance for the government of the territory ceded by Virginia, which now composes the States north of the Ohio river. The same article of the Constitution stipulates also for rendition by the several States of fugitives from justice from the other States. The general government, as the common agent, passed laws to carry into effect these stipulations of the States. For many years these laws were executed. But an increasing hostility on the part of the non-slaveholding States to the institution of slavery has led to a disregard of their obligations, and the laws of the General Government have ceased to effect the objects of the Constitution. The States of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, Pennsylvania, Illinois, Indiana, Michigan, Wisconsin and Iowa have enacted laws which either nullify the Acts of Congress or render useless any attempt to execute

them.<sup>1</sup> In many of these States the fugitive is discharged from the service or labor claimed, and in none of them has the State Government complied with the stipulation made in the Constitution. The State of New Jersey, at an early day, passed a law in conformity with her constitutional obligation; but the current of anti-slavery feeling has led her more recently to enact laws which render inoperative the remedies provided by her own law and by the laws of Congress. In the State of New York even the right of transit for a slave has been denied by her tribunals, and the States of Ohio and Iowa have refused to surrender to justice fugitives charged with murder, and with inciting servile insurrection in the State of Virginia. Thus the constituted compact has been deliberately broken and disregarded by the non-slaveholding States, and the consequence follows that South Carolina is released from her obligation.

“The ends for which this Constitution was framed are declared by itself to be, ‘to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our

<sup>1</sup> These were the “personal liberty” laws, 1840-1860. See Parker’s *Personal Liberty Laws*; and the annual *Cyclopaedia* for 1860 and 1861.

The Vermont act of 1843 (Revised Statutes of 1851, Title XXVII) may be cited as a type. It forbade courts and magistrates to act under the U. S. Statutes of 1793, and forbade officers and citizens under penalty of \$1,000 to aid in carrying out the fugitive slave law. The slave was given trial by jury; the State attorney was to give him counsel. But the law did not apply to U. S. courts and officers. New Hampshire passed a similar act, July 10, 1846. See acts of N. Y., 1840; Mass., 1843; Pa., 1847; R. I., 1848; Ct., R. I., Vt., 1854; Mich., Mass., Maine, 1858; Ohio, 1859; Pa., 1860. These acts after 1850 were called forth by the new fugitive slave law of that year; see *Statutes at Large*, IX, 462.

posterity.' These ends it endeavored to accomplish by a federal government, in which each State was recognized as an equal, and had separate control over its own institutions. The right of property in slaves was recognized by giving to free persons distinct political rights; by giving them the right to represent, and burthening them with direct taxes for three-fifths of their slaves; by authorizing the importation of slaves for twenty years, and by stipulating for the rendition of fugitives from labor. We affirm that these ends for which this Government was instituted have been defeated, and the Government itself has been made destructive of them by the action of the non-slaveholding States. Those States have assumed the right of deciding upon the propriety of our domestic institutions, and have denied the rights of property established in fifteen of the States and recognized by the Constitution; they have denounced as sinful the institution of slavery; they have permitted the open establishment among them of societies, whose avowed object is to disturb the peace and to eloign the property of the citizens of other States. They have encouraged and assisted thousands of our slaves to leave their homes, and those who remain have been incited by emissaries, books and pictures to servile insurrection.

"For twenty-five years this agitation has been steadily increasing until it has now secured to its aid the power of the common government. Observing the *forms* of the Constitution, a sectional party has found within that article establishing the Executive Department, the means of subverting the Constitution itself. A geographical line has been drawn across the Union, and all the States north of that line have united in the election of a man to the high office of President of the United States whose opinions are hostile to slavery. He is to be intrusted with

the administration of the common government because he had declared that that 'Government cannot endure permanently half slave, half free,'<sup>1</sup> and that the public mind must rest in the belief that slavery is in the course of ultimate extinction. This sectional combination for the submersion of the Constitution has been aided in some of the States by elevating to citizenship persons, who, by the supreme law of the land, are incapable of becoming citizens;<sup>2</sup> and their votes have been used to inaugurate a new policy, hostile to the South and destructive of its peace and safety.

"On the fourth of March next, this party will take possession of the Government. It has announced that the South shall be excluded from the common territory, that the judicial tribunals shall be made sectional, and that a war must be waged against slavery until it shall cease throughout the United States. The guarantees of the Constitution will then no longer exist; the equal rights of the States will be lost. The slave-holding States will no longer have the power of self-government, or self-protection, and the federal government will have become their enemy. Sectional interest and animosity will deepen the irritation, and all hope of remedy is rendered vain by the fact that public opinion at the North had invested a great political error with the sanctions of a more erroneous religious belief.

"We, therefore, the People of South Carolina, by our

<sup>1</sup> Lincoln's speech at Springfield, Ill., June 16, 1858—at the close of the Republican State Convention, which had nominated him for U. S. Senator, against Stephen A. Douglas. It is the opening speech in the volume of "Debates of Lincoln and Douglas." See Lincoln's Works, I, 240. The speech is dated the 17th, in the original edition of the Debates.

<sup>2</sup> Free persons of color, allowed to vote in N. H., Vt., Mass. and N. Y. in 1860.

delegates in convention assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, have solemnly declared that the Union heretofore existing between this State and the other States of North America is dissolved, and that the State of South Carolina has resumed her position among the nations of the world as a separate and independent State, with full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent States may of right do.”<sup>1</sup>

The intention of the authors of this declaration to imitate the Declaration of Independence and to proclaim that the relation of the slave-holding States to the United States was the same as that of the Colonies to Great Britain in 1776 is clear. The American Revolution was to be fought again. The rights of “free, sovereign and independent States” were to be protected. Yet, as we have seen, State sovereignty was not explicitly claimed by the States in 1776.<sup>2</sup> But the purpose of Carolina was to put the free States and, prospectively, the national government, wholly in the wrong. They had broken the compact. The slave-holding States had alone kept the faith of the fathers and therefore they should secede from the violators of the Constitution. But South Carolina did not rest her case here. More was to be said than merely a constitutional statement of the reasons for secession. There were economic and political reasons, and these were declared at length in the “Address to the People of the Slaveholding States.”

During the seventy-three years of the Republic, this address declared, the great object of its foundation had

<sup>1</sup> Journal of the S. C. Convention, 1860-61, 62, pp. 461-466. For a similar address see Smith's Alabama Convention, pp. 445-447.

<sup>2</sup> See Vol. I, pp. 173, 267, 307.

been realized: defense against external aggression. But for thirty-five years discontent had "moved in the bosom of the Confederacy." Twice had South Carolina met in convention "to take into consideration the aggressions and unconstitutional wrongs perpetrated by the people of the North on the people of the South."<sup>1</sup> The one great evil now was the overthrow of the Constitution. No longer was the government of the United States one of "Confederated Republics, but of a consolidated Democracy." It was "no longer a free government, but a despotism—such as Great Britain attempted to set over our fathers, and which was resisted and defeated by seven years' struggle for independence. The Revolution of 1776 turned upon one great principle, self-government and self-taxation, the criterion of self-government. Where the interests of two peoples, united together under one government, are dif-

<sup>1</sup> The "Nullification Convention" of November 19, 1832; and the Convention of April 26, 1852. The nullification ordinance was repealed by the Convention, March 15, 1833.

The following letter, hitherto unpublished, was written to President Jackson, from the Convention, on the day of the repeal, with Jackson's endorsement and forcible comments:

To the President of the United States.

Sir:—The Ordinance rescinding the Ordinance of Nullification and all the laws passed in pursuance thereof passed the Convention yesterday, only four Nullifiers voting against it. A few remarks from Judge Richardson, who thought Mr. Clay's Bill did not fully abandon the principle of protection, brought out Mr. McDuffie, who dealt profusely in opprobrious epithets towards the Chief Magistrate of the United States, and the members of his Cabinet; he spoke most lovingly of "our great ally in the West, whom we had recently gained;" congratulated the Convention on the triumph of Nullification, and concluded by advising the State to retain its belligerent attitude, as we had no rights except those we could command by force and arms—the despotism at Washington having swallowed up everything.

The Committee of 21 reported an Ordinance prescribing another oath to be taken by citizens. I will forward a copy of the

ferent, each must have the power to protect its interests by the organization of the Government or it could not be free. "The southern States now stand exactly in the same position toward the northern States that the colonies did towards Great Britain. The northern States, having the majority in Congress, claim the same power of omnipotence in legislation as the British Parliament. 'The general welfare' is the only limit to the legislation of either; and the majority in Congress, as in the British Parliament, are the sole judges of the expediency of the legislation this 'general welfare' requires. Thus the government of the United States had become a consolidated government, and the people of the southern States are compelled to meet the very despotism their fathers threw off in the Revolution of 1776.

"The consolidation of the government of Great Britain over the colonies was attempted to be carried out by taxes. The British Parliament undertook to tax the colonies to

report of the Committee as soon as I can obtain one. It is thought, however, that the new oath will not receive the sanction of the Convention.

Gen. Hamilton made quite a conciliatory speech yesterday towards the Union party, which Judge O'Neill very cordially responded to.

Very respectfully yours, etc.,

AUGUSTUS FITCH.

Columbia, March 16th, 1833.

P. S. This is also a great muster-day here. Gov. Hayne is to review the Volunteers, but he will not find them any great affair.

Saturday, March 16th.

A. F.

Across the face of the letter, which was addressed, His Excellency, Andrew Jackson, President of the United States, Washington, D. C., the President indorsed:

Mr. Fitz.—The Ordinance & all laws under it repealed—so ends the wicked & disgraceful conduct of Calhoun McDuffie & their co-nullies. They will only be remembered, to be held up to scorn by everyone who loves freedom, our glorious constitution & government of laws.

A. J.



promote British interests. Our fathers resisted this pretension. They claimed the right of self-taxation *through their colonial Legislatures*. They were not represented in the British Parliament and, therefore, could not rightly be taxed by its legislation. The British government, however, offered them representation in Parliament, but it was not sufficient to enable them to protect themselves from the majority, and they refused the offer. Between taxation without a representation and taxation without a representation adequate to protection there was no difference. In neither case would the colonies tax themselves. Hence they refused to pay taxes laid by the British Parliament.

“And so with the southern States toward the northern in that vital matter of taxation. They are in a minority in Congress. Their representation in Congress is useless to protect them against unjust taxation, and they are taxed by the people of the North *for their benefit*, exactly as the people of Great Britain taxed our ancestors.” For the last forty years the taxes laid by Congress had subserved the interest of the North. “The people of the South have been taxed by duties on imports, not for revenue, but for an object inconsistent with revenue, to promote, by prohibitions, northern interests in the production of their mines and manufactures.”

Nor was this the limit of the evil. The defeated British policy of 1776 had been fully realized towards the southern States by the northern. “The people of the southern States are not only taxed for the benefit of the northern, but after the taxes are collected, three-fourths of them are expended at the North.” This cause, it was now claimed, had “made the cities of the South provincial;” paralyzed their growth and made them “mere suburbs of the northern cities.” It had “almost annihi-

lated" the foreign trade of the South.<sup>1</sup> No man could for a moment believe that such a government was intended when the government of the United States was formed. That government was "limited to those matters only which were general and common to all portions of the United States. All sectional and local interests were to be left to the States. By no other arrangement would they obtain free government" under a "Constitution common to so vast a Confederacy."

It was not at all surprising "such being the character of the government of the United States, that it should assume to possess power over all the institutions of the country." The agitations on the subject of slavery were "the natural results of the consolidation of the government." "Responsibility follows power, and if the people of the North have the power by Congress, 'to promote the general welfare of the United States' by any means they deem expedient, why should they not assail and overthrow the institution of slavery in the South?" "To build up their sectional predominance in the Union the Constitution must be first abolished by constructions, but that being done, the consolidation of the North to rule

<sup>1</sup> "Our foreign trade is almost annihilated. In 1740, there were fine ship-yards in South Carolina, to build ships to carry on our direct trade with Europe. Between 1740 and 1779, there were built in these yards twenty-five square rigged vessels beside a great number of sloops and schooners to carry on our coast trade and West India trade. In the half century immediately preceding the Revolution, from 1725 to 1775, the population of South Carolina increased seven fold." (Journal of Convention, 469-470.)

For the effect of slavery on skilled labor, immigration and productions, see Theodore Parker's "Letters to the People of the United States touching the matters of slavery. Boston: James Monroe and Company, MDCCCXLVIII. Also its discussion in the Constitutional Convention of Kentucky, 1849, in Vol. II, Chapter vi, of my Constitutional History of the American People, 1776-1850." Parker's Letter was based on the census of 1840.

the South, by the tariff and slavery issues, was in the obvious course of things."

"The Constitution of the United States was an experiment. The experiment consisted in uniting under one government peoples living in different climates, and having different pursuits and institutions. It matters not how carefully the limits of such a government be laid down in the Constitution—its success must, at least, depend upon the good faith of the parties to the constitutional compact in enforcing them. It is not in the power of human language to exclude false inferences, constructions and perversions in any Constitution, and when vast sectional interests are to be subserved, involving the appropriation of countless millions of money, it has not been the usual experience of mankind that words on parchment can arrest power. The Constitution of the United States, irrespective of the interposition of the States, rested on the assumption that power would yield to faith—that integrity would be stronger than interest, and that thus the limitations of the Constitution would be observed. The experiment has been fairly made. The Southern States, from the commencement of the Government, have striven to keep within the orbit prescribed by the Constitution. The experiment has failed. The whole Constitution, by the constructions of the northern people, has been absorbed by its preamble. The northern people have had neither the wisdom nor the faith to perceive that to observe the limitations of the Constitution was the only way to its perpetuity.

"Under such a government there must, of course, be many and endless 'irrepressible conflicts' between the two great sections of the Union. The same faithlessness which has abolished the Constitution of the United States will not fail to carry out the sectional purposes for which

it was abolished. There must be conflict, and the weaker section of the Union can only find peace and liberty in an independence of the North. The repeated efforts made by South Carolina, in a wise conservatism, to arrest the progress of the general government in its fatal progress to consolidation have been unsupported, and she has been denounced as faithless to the obligations of the Constitution by the very men and States who were destroying it by their usurpations. It is now too late to reform or restore the government of the United States. All confidence in the North is lost by the South. The faithlessness of the North for half a century has opened a gulf of separation between the North and the South which no promises nor engagements can fill.

“It cannot be believed that our ancestors would have assented to any union whatever with the people of the North if the feelings and opinions now existing amongst them had existed when the Constitution was framed. There was no tariff—no fanaticism concerning negroes. It was the delegates from New England who proposed in the convention which framed the Constitution to the delegates from South Carolina and Georgia that if they would agree to give Congress the power of regulating commerce *by a majority*, they would support the extension of the African slave trade for twenty years. African slavery existed in all the States but one. The idea that the southern States would be made to pay that tribute to their northern confederates which they had refused to pay to Great Britain, or that the institution of African slavery would be made the grand basis of a sectional organization of the North to rule the South never crossed the imagination of our ancestors. The Union of the Constitution was a Union of the slave-holding States. It rests on slavery by prescribing a representation in Con-

gress for three-fifths of our slaves. There is nothing in the proceedings of the convention which framed the Constitution to show that the southern States would have formed any other Union, and still less that they would have formed a Union with more powerful non-slaveholding States having a majority in both branches of the Legislature of the government. They were guilty of no such folly. Time and the progress of things have totally altered the relations between the northern and southern States since the Union was established. That identity of feelings, interests and institutions which once existed is gone. They are now divided between agricultural and manufacturing, and commercial States; between slaveholding and non-slaveholding States. Their institutions and industrial pursuits have made them totally different peoples. That equality in the government between the two sections of the Union which once existed no longer exists. We but imitate the policy of our fathers in dissolving a union with non-slaveholding confederates and seeking a confederation with slave-holding States.

“Experience has proved that slaveholding States cannot be safe in subjection to non-slaveholding. Indeed, no people can ever expect to preserve its rights and liberties unless these be in its own custody. To plunder and oppress, where the plunder and oppression can be practiced with impunity, seems to be the natural order of things. The fairest portions of the world elsewhere have been turned into wildernesses, and the most civilized and prosperous communities have been impoverished and ruined by anti-slavery fanaticism. The people of the North have not left us in doubt as to their designs and policy. United as a section in the late presidential election, they have elected, as the exponent of their policy, one who has openly declared that all the States of the

United States must be made *free States or slave States*. It is true that amongst those who aided in his election there are various shades of anti-slavery hostility. But if African slavery in the Southern States be the evil their political combination affirms it to be, the requisitions of an inexorable logic must lead them to emancipation. If it is right to preclude or abolish slavery in a territory, why should it be allowed to remain in the States? The one is not at all more unconstitutional than the other, according to the decisions of the Supreme Court of the United States. And when it is considered that the Northern States will soon have the power to make the Court what they please, and that the Constitution never has been any barrier whatever to their exercise of power, what check can there be, in the unrestrained counsels of the North, to emancipation?

“In separating from them we invade no rights, no interests of theirs. We violate no obligation or duty to them. As separate, independent States in convention, we made the Constitution of the United States with them, and as separate, independent States, each acting for itself, we adopted it. South Carolina, acting in her sovereign capacity, now thinks proper to secede from the Union. She did not part with her sovereignty in adopting the Constitution. The last thing a State can be presumed to have surrendered is her sovereignty. Her sovereignty is her life. Nothing but a clear, express grant can alienate it. Inference is inadmissible. Yet it is not surprising that those who have construed away all the limitations of the Constitution should also, by construction, claim the annihilation of the sovereignty of the States.

“Citizens of the slave-holding States of the United States! Circumstances beyond our control have placed

us in the van of the great controversy between the Northern and Southern States. South Carolina desires no destiny separated from yours. To be one of a great slaveholding Confederacy, stretching its arms over a territory larger than any power in Europe possesses; with a population four times greater than that of the whole United States when they achieved their independence of the British empire; with productions which make our existence more important to the world than that of any other people inhabiting it; with common institutions to defend and common dangers to encounter, we ask your sympathy and confederation. Whilst constituting a portion of the United States, it has been *your* statesmanship which has guided it in its mighty strides to power and expansion. In the field, as in the cabinet, *you* have led the way to its renown and grandeur. You have loved the Union, in whose service your great statesmen have labored and your great soldiers have fought and conquered—not for the material benefits it conferred, but with the faith of a generous and devoted chivalry. You have long lingered in hope over the shattered remains of a broken Constitution. Compromise after compromise, formed by your concessions, has been trampled under foot by your Northern confederates. All fraternity of feeling between the North and the South is lost, or has been converted into hate; and we of the South are at last driven together by the stern destiny which controls the existence of nations. Your bitter experience of the faithlessness and rapacity of your Northern confederates may have been necessary to evolve those great principles of free government, upon which the liberties of the world depend, and to prepare you for the grand mission of vindicating and re-establishing them. We rejoice that other nations should be satisfied with their institutions. We are satisfied with ours. If they prefer

a system of industry in which capital and labor are in perpetual conflict—and chronic starvation keeps down the natural increase of population—and a man is worked out in eight years—and the law ordains that children shall be worked only ten hours a day—and the sabre and the bayonet are the instruments of order—be it so. It is their affair, not ours. We prefer, however, our system of industry, by which labor and capital are identified in interest, and capital, therefore, protects labor; by which our population doubles every twenty years; by which starvation is unknown and abundance crowns the land; by which order is preserved by an unpaid police, and many fertile regions of the world, where the white man cannot labor, are brought into usefulness by the labor of the African, and the whole world is blessed by our productions. All we demand of other peoples is to be left alone to work out our own high destinies. United together, and we must be the most independent as we are among the most important of the nations of the world. United together, and we require no other instrument to conquer peace than our beneficent productions. United together, and we must be a great, free, prosperous people whose renown must spread throughout the civilized world and pass down, we trust, to the remotest ages. We ask you to join us in forming a Confederacy of Slaveholding States.”<sup>1</sup>

This declaration of independence by American slavery is among the most extraordinary documents of history. An American can scarcely believe now that such

<sup>1</sup> Journal of South Carolina Convention, 467-476.

For a similar “Declaration of Causes” see those of Georgia, in Journal of Georgia Convention, 104-113, and Mississippi, in Journal of the Mississippi Convention, pp. 86-88.

The South Carolina Declaration to the Slaveholding States was reprinted in the Journal of the Arkansas Convention, 1861, pp. 495-504; the South Carolina Declaration of Causes, on pp. 487-492.



a declaration was ever written, not to say, published, by his countrymen. It speedily was sent to the executives of the slaveholding States, was by them laid before their legislatures, and its doctrines and sentiments loudly approved. Other States issued similar declarations. Perhaps no comment more true, and at the same time more significant can be made of them all than that not one word of them is now remembered by the people. The Declaration of Independence passed at once and permanently into the every-day speech of men. Its truths were self-evident; its aspirations were the breath of the people. It may be accepted as a test of the justice of a great public movement, a revolution, a war, that it enriches the common speech and the literature as well as corrects the wrongs of mankind. Posterity never forgets anything worth remembering.

In the South Carolina declaration of 1860 may be read the brief of all oppositions to nationality from the foundation of the government. Its appeal for a slaveholding Confederacy was the consequence of seventy years of an ever strengthening slavocracy that hated free labor and would have none of it. The whole matter was a conflict between systems of labor and was as old as man. It was free industry, diversified against slave labor, homogeneous. Agriculture by slavery, on the one side; agriculture, manufactures, commerce, by free labor, on the other. Out of these differences grew all the rest: constitutional doctrines; legal interpretations of government; political theories. When the discords of our country engendered by slavery are resolved into their elements, nothing more will be found. The South Carolina declaration illustrates how a great people may be misled to their sorrow. The province of the historian is not to incriminate. He is only a chronicler. But he writes for those to whom the past

may be unknown, and the accusations of parties, the claims of factions, spread, uncorrected, on the pages of history, may pervert the judgment of posterity and perpetuate errors.

The South Carolina program of secession was repeated, with little variation in other slaveholding States. The governor assembled the legislature; a disunion message was delivered; a secession campaign, started long before was vigorously carried on. A convention "direct from the people" was called. Public opinion was thus guided and guarded by the secession leaders. An ordinance of secession was formally passed amidst great excitement, the thunder of cannon, the raising of a new flag<sup>1</sup> and with electric notice to the whole world. The State was put in readiness for war,—for which preparation had long been made. The Breckinridge, not the Douglas, Democrats of the South were foremost in the movement.

<sup>1</sup> The "official description" of the scenes attending the passage of the secession ordinance in Alabama is given by William R. Smith, one of the delegates from Tuscaloosa. He voted against the ordinance.

The question being upon the adoption of the Preamble, Ordinance of Secession and Resolutions as amended, the vote was—ayes, 61; noes, 39. (Among the ayes were seven "elected as co-operationists.") Mr. President Brooks announced the result of the vote and that the Ordinance of Secession was adopted, and that Alabama was a free, sovereign and independent State. Mr. Yelverton introduced the following resolution:

Resolved, That the secrecy be removed from the proceedings of this day, and that the President of the Convention be requested to telegraph the information of the passage of the ORDINANCE OF SECESSION to our members of Congress, and to the Governors of the Slaveholding States.

Mr. Yelverton's Resolution was adopted, and by motion of Mr. Yancey, the doors were thrown open.

It would be difficult to describe with accuracy the scenes that presented themselves in and around the Capitol during this day. A vast crowd had assembled in the rotunda, eager to hear the

announcement of the passage of the Ordinance. In the Senate Chamber, within hearing of the Convention, the citizens and visitors had called a meeting; and the company was there addressed by several distinguished orators, on the great topic which was then engrossing the attention of the Convention. The wild shouts and the round of rapturous applause that greeted the Speakers in this impromptu assembly often broke in upon the ear of the Convention, and startled the grave solemnity that presided over its deliberations.

Guns had been made ready to herald the news, and flags had been prepared in various parts of the city to be hoisted upon a signal.

When the doors were thrown open the lobby and the galleries were filled to suffocation in a moment. The ladies were there in crowds, with visible eagerness to participate in the exciting scenes. With them the love songs of yesterday had swelled into the political hosannas of to-day.

#### PRESENTATION OF THE FLAG.

Simultaneously with the entrance of the multitude, a magnificent Flag was unfurled in the center of the Hall, so large as to reach nearly across the ample chamber. Gentlemen mounted upon tables and desks held up the floating ends, the better thus to be able to display its figures. The cheering was now deafening for some moments. It seemed really that there would be no end to the raptures that had taken possession of the company.

Mr. Yancey addressed the Convention, in behalf of the ladies of Montgomery, who had deputed him to present to the Convention this Flag, the work of the ladies of Alabama. In the course of his speech he described the mottoes and the devices of the flag, and paid a handsome tribute to the ardor of the female patriotism.

The roar of cannon was heard during the remainder of this eventful day. The new flag of Alabama displayed its virgin features from the windows and towers of surrounding houses; and the finest orators of the State in harangues of congratulation, commanded until a late hour in the night the attention of shouting multitudes. Every species of enthusiasm prevailed. Political parties, which had so lately been standing in sullen antagonism, seemed for the time to have forgotten their differences of opinion; and one universal glow of fervent patriotism kindled the enraptured community."

(History and Debates of the Convention of Alabama, for January Eleventh, 1861, 118-119, 122. For similar scenes in South Carolina, see Crawford's Genesis of the Civil War, Chapters I, II.)

In the mountainous part of Georgia and Alabama, indeed over that mountainous peninsula which projects southward between the Mississippi river and the Atlantic seaboard, disunion sentiment was feeble and secession was not easily carried out. Threats of coercion were freely made,—and not always in vain by the “straight-out” disunionists.<sup>1</sup> The real leaders of the whole movement were in Washington,—Senators, members of Congress and of the President’s cabinet, and judges in United States Courts. If the leaders in the seceding States seem more ardent and active, it was because they were less prominent in the movement than their confederates in Washington. It is not always the chief leader who carries the red flag. That the secession program of 1860 was planned in Washington by those who soon became the chief officials of the

<sup>1</sup> The attitude of the “co-operationists” as distinct from the “straight-out secessionists” towards the question of separation from the Union is shown in the Minority Report, of the Committee of Thirteen, in the Alabama convention, “to whom was referred all matters touching the proper mode of resistance to be adopted by the State of Alabama,” etc., etc.

“Looking to harmony of action among our own people as desirable above all other things, we have been earnestly desirous of concurring with the majority in the line of policy marked out by them, but after the most careful consideration, we have been unable to see in Separate State Secession the most effectual mode of guarding our honor and securing our rights. Without entering into any argument upon the nature and amount of our grievances, or any speculations as to the probability of our obtaining redress and security in the Union, but looking alone to the most effectual mode of resistance, it seems to us that this great object is best to be attained by the concurrent and concerted action of all the States interested, and that it becomes us to make the effort to obtain that concurrence, before deciding finally and conclusively on our own policy.

“We are further of opinion that, in a matter of this importance vitally affecting the property, the lives and the liberties of the whole people, sound policy dictates that an ordinance of secession should be submitted for their ratification and approval.”

Confederacy is beyond doubt. Whether to secede as separate States, or in a body, was for some time the question. In South Carolina the "straight-out" secession faction was in control and separate State secession was inaugurated. By the first of February, 1861, six States had followed the example. But long before that date, a general convention that should not meet later than the middle of February for the purpose of organizing a Southern Confederacy, had been practically agreed upon.

The action of South Carolina was not a spark from a sudden generation of heat, for the seeds of disunion may be said to have been planted with the planting of the government. Not merely the compromises of the Constitu-

Accompanying the report was a program for pacification:

(1) All the slaveholding States to meet in convention at Nashville, Tennessee, on the 22d day of February, 1861, to consider their wrongs and the appropriate remedies for them.

(2) The Constitution of the United States to be amended so as to secure:

(1) A faithful execution of the Fugitive Slave Law, and a repeal of all State Laws calculated to impair its efficacy.

(2) A more stringent and explicit provision for the surrender of criminals charged with offences against the laws of one State and escaping into another.

(3) A guarantee that slavery shall not be abolished in the District of Columbia, or in any other place over which Congress has exclusive jurisdiction.

(4) A guarantee that the inter-State slave trade shall not be interfered with.

(5) A protection to slavery in the Territories, while they are Territories, and a guarantee that when they ask for admission as States they shall be admitted into the Union with or without slavery, as their Constitutions may prescribe.

(6) The right of transit through free States with slave property. (Alabama Convention, 77-79.)

The motion to submit the secession ordinance to popular vote was defeated by a vote of 45 to 54. For the relative advantages of co-operation and straight-out secession, see Clark's speech, Alabama Convention, 81-90.

See also pp. 55, 147, 281, 323, 325, 336, 354, 358.

tion, but the antagonistic administrative policies which necessarily grew out of the two industrial systems in the country, bred disaffection, sectionalism, distrust and disunion. Because the Hartford Convention voiced the opinion of some New Englanders, in 1812, touching slave-representation, the admission of new States, embargoes, the power to declare war, native-Americanism, and a single term for the President,<sup>1</sup> it is by no means proof that New England, or the delegates who framed the Hartford resolutions had any intention to advocate disunion and secession. But even granting the truth of such a charge, the Hartford resolutions indicate no more than political discontent.<sup>2</sup>

From 1814 to 1832, disunion sentiments were frequently heard in Congress; secession as a political remedy was openly mentioned in debate in State legislatures, and in conventions, and it was the theme of an ever-growing volume of pamphlet literature. The South Carolina Convention of 1832 merely condensed a mass of disunion sentiment that had been accumulating for at least twenty years. Nullification was as old as the Kentucky Resolutions and was quieted for a time by the vigorous Jackson and the compromising Clay. After 1848 and the acquisition of California, and the discovery of gold, and the swift movement of population into Western territory, the doctrines of State sovereignty, free-trade, slavery extension and confederacy became more clearly antithetic to those of national sovereignty, a tariff for protection, unrestricted immigration, and the extension of the franchise, and a growing demand, after 1850, that slavery be excluded from

<sup>1</sup> Proceedings (Boston, 1815), 20, 21.

<sup>2</sup> For a refutation of the charge of disloyalty, made against this Convention, see Otis' Letters, in Defence of the Hartford Convention, especially Nos. VIII and IX (Boston, 1824). Also Dwight's History of the Convention, 405.

the territories.<sup>1</sup> A contest for population sprang up between the supporters of the two industrial systems. By the Compromise of 1820 and again by that of 1850, slavery lost in the great struggle. At last, population, from the North and from the South, met face to face in a new territory, Kansas, in the middle of the continent, and a local war broke out between the slaveholders and the free-soilers. The organization of Kansas and Nebraska in 1854, with the accompanying repeal of the Compromise of 1850 demonstrated that the party in power was bent upon the nationalization of slavery. The pro-slavery triumph seemed for a moment permanent. The elections in 1856 continued the executive and the legislative departments of the national government in the hands of pro-slavery men. The Supreme Court followed, immediately, in the Dred Scott decision, as it seems to have believed, with a final disposition of the great issue: making the nationalization of slavery the law of the Constitution. The very success of slavocracy made disunion sentiment superfluous. But it existed and exercised a powerful influence. In September, 1856, Governor Wise, of Virginia, in a letter to the Governor of Maryland, advocated a meeting of the executives of slaveholding States to consult on the best means of protecting their honor and interests.<sup>2</sup> Threats of a resort to force, to protect these interests, abounded at the time the admission of California was a national issue, and, indeed, from the time when, in 1837, the "re-annexation" of Texas was advo-

<sup>1</sup> This was brought out fully in the Debates in the California Constitutional Convention of 1849. See my *Constitutional History of the American People, 1776-1850*, Vol. II, Chapters X, XI, XII.

<sup>2</sup> Henry A. Wise to Thomas W. Ligon, Richmond, Sept. 15, 1856. Printed in full in Nicolay and Hay's *Lincoln*, II, 299.

cated by the Alabama legislature.<sup>1</sup> State after State responded to Alabama, North and South, but the resolutions of Southern legislatures spoke with a military tone, which became sharper and more peremptory as the years passed.<sup>2</sup> While Jefferson Davis was Secretary of War,—during the whole of Pierce's administration, the South was put gradually in a state of military defense. "Immediate, absolute and eternal separation" was advocated, but secretly. For years before the election of Lincoln, William L. Yancey had boldly advocated disunion. He would imitate the Fathers, "organize 'committees of safety' all over the Cotton States," "fire the Southern heart" "and at the proper moment, by one organized, concerted action, we can precipitate the Cotton States into a revolution." "The Southern issue" he declared "paramount," that it would "influence parties, legislatures and statesmen."<sup>3</sup> This was the notorious "Scarlet Letter" and was written during the second year of Buchanan's term. At this time "an active, organized and dangerous faction" in the South was well known to its public men, and Governor Wise declared that its efforts, nominally to secure the election in 1860, were "for no other end than to make a pretext for the clamor of dissolution."<sup>4</sup>

As soon as Lincoln was nominated for the Presidency, the secession program was hurried up, and his election was declared to be sufficient cause for breaking up the Union. The similarity between the correspondence of

<sup>1</sup> For the resolutions of Northern and Southern States on this subject, on California and Slavery, 1837-1850, see my *Constitutional History of the American People, 1776-1850*, Vol. I, 337-341.

<sup>2</sup> Louisiana, 1837; Florida, 1849; S. C., 1850, in above resolutions.

<sup>3</sup> See letters of J. M. Wise and W. L. Yancey, in Nicolay and Hay's *Lincoln*, II, 300, 301.

<sup>4</sup> *Id.*, 302, note.



the slave-State executives and the declarations of the secession conventions make this clear.<sup>1</sup> The issue was plainly put by the Governor of North Carolina: "the institution of negro slavery in this country."<sup>2</sup> Georgia, Alabama, and Louisiana,—as their Governors spoke for them, would not secede alone, but would meet the slaveholding States in Convention and agree upon final measures,—the formation of a slaveholding Confederacy. The persistence of the word "confederacy" in our history was ominous. It stood, from the beginning, for disunion and weakness. At first, the danger was said to be a "consolidated government;" this was the complaint down to 1815. Then the federal government made an alliance with a protective policy; this was the complaint down to 1833. Then began mutterings of a federal policy to exclude slavery from new soil and to tolerate abolition petitions. This complaint continued to the hour of the South Carolina Convention of 1860.<sup>3</sup> But behind all these complaints was the radical and permanent difference between two

<sup>1</sup> Much of this correspondence is printed in the Journals of the Secession Conventions. See Appendix to Journals of Mississippi Convention; also of Georgia Convention; of Arkansas Convention, and communications printed in the Virginia Journal.

<sup>2</sup> Governor John W. Ellis to Governor W. H. Gist of S. C., Raleigh, Oct. 18, 1860, in Nicolay and Hay's Lincoln, II, 307.

<sup>3</sup> "Did the Constitution protect us from the cupidity of the Northern people, who for thirty-five years have imposed the burden of supporting the General Government chiefly on the industry of the South? Did it save us from Abolition petitions, designed to annoy and insult us, in the very halls of our Federal Congress? Did it enable us to obtain a single foot of the soil acquired in the war with Mexico, where the South furnished three-fourths of the money, two-thirds of the men and four-fifths of the graves?

Did it oppose any obstacle to the erection of California into a free-soil State, without any previous territorial existence, without any defined boundaries or any census of her population?

Speech of D. F. Jameson on taking the chair in the S. C. Convention, December 17, 1860. Journal, p. 4.

social and industrial systems. There was nothing congenial between the two sections of the country. The gulf between them was accurately described in the Declaration of Causes for Secession issued by South Carolina.<sup>1</sup>

But the program of secession received no check from the national government itself. The President himself, in 1860, would say no more than *non possumus*. In his last annual message to Congress, Buchanan fixed, at least to his satisfaction, the responsibility for the prevailing discontent, that threatened the Union with destruction: "The long-continued and intemperate interference of the Northern people with the question of slavery has at length produced its natural effects." The abolitionists were wholly to blame. Let the slaveholding States alone and allow them to manage their domestic institutions in their own way. As sovereign States they alone were responsible for slavery. In spite of the Dred Scott decision, the territorial legislature of Kansas had prohibited slavery in the territory, thus plainly setting the Constitution at defiance. Only in a convention forming a State Constitution could such a thing be done. And, one by one, Buchanan took up the complaints of the seceding States, and repeated them. The "personal liberty bills" violated the Constitution. The North was in duty bound to return fugitive slaves. In case the North persisted, the South was justified in its "revolutionary resistance." But the constitutionality of secession the President doubted and he quoted at length from Jackson's special message of 1833, directed to the people of South Carolina, to prove that no clause in the Constitution gave countenance to the theory. But what was the Chief Executive to do if the performance of his duty had "been rendered impracticable by events over which, in whole or in part, he could have exer-

<sup>1</sup> See pp. 564-570.

cised no control?" "In fact," continued the message, "the whole machinery of the federal government, necessary for the distribution of remedial justice among the people, has been demolished, and it would be difficult, if not impossible, to replace it." "The question fairly stated is, Has the Constitution delegated to Congress the power to coerce a State into submission, which is attempting to withdraw, or, has actually withdrawn, from the Confederacy? If answered in the affirmative, it must be on the principle that the power has been conferred upon Congress to declare, and to make war against a State. After much serious reflection, I have arrived at the conclusion that no such power has been delegated to Congress, or to any other department of the federal government. It is manifest upon an inspection of the Constitution that this is not among the specific and enumerated powers granted to Congress, and it is equally apparent that its exercise is not 'necessary and proper for carrying into execution' any one of these powers. So far from this power having been delegated to Congress, it was expressly refused by the Convention which framed the Constitution. It appears from the proceedings of that body on the thirty-first of May, 1787, the clause 'authorizing an exertion of the force of the whole against a delinquent State' came up for consideration. Mr. Madison opposed it in a brief but powerful speech, from which I shall extract but a single sentence. He observed: 'The use of force against a State would look more like a declaration of war than an infliction of punishment, and would probably be considered by the party attacked as a dissolution of all previous compacts by which it might be bound.' Without descending to particulars, it may be safely asserted that the power to make war against a State is at variance with the whole spirit and intent of the

Constitution." The President, therefore, saw no escape for the Union from dissolution, unless, perhaps, the Constitution was amended in three particulars: First, by expressly recognizing the right of property in slaves, wherever it might exist; secondly, by protecting slave property in all the Territories as long as they remained Territories, and until they became States, in the Union, with or without slavery as their constitution provided; and thirdly, a like recognition of the right of the master to have his fugitive slave delivered up to him; the Constitution thus being made to declare all laws violating the fugitive slave act, "null and void." Such an amendment would save the Union.<sup>1</sup>

Buchanan's proposed amendments have a familiar sound. Did they originate in that caucus attended in early May by Jefferson Davis, Robert Toombs, Benjamin Slidell, Judah P. Benjamin, Alfred Iverson and James M. Mason, with fourteen others, who drew up the address which, after discussion in the Senate, in the form of resolutions, was adopted by the Senators,—resolutions of pro-slavery sentiments abounding, and at last became the platform on which Breckinridge and Bell were nominated by the seceding convention at Baltimore? The tone, the doctrine, the consequences were alike. Again, they were like the amendments proposed by the minority, in the secession conventions of Alabama,<sup>2</sup> Georgia,<sup>3</sup> and Louisiana,<sup>4</sup> and had the same purpose,—the pacification of the country by making slavery the chief corner-stone.

Nor was this the end. The President's cabinet was not free from complicity in the secession movement. The

<sup>1</sup> Richardson's Messages and Papers of the Presidents, V, 627-639.

<sup>2</sup> Journal, 77-80.

<sup>3</sup> Journal, 15-20.

<sup>4</sup> Journal, 10, 11, 12.

Secretary of the Treasury, Howell Cobb, of Georgia; the Secretary of War, John B. Floyd, of Virginia; and the Secretary of the Interior, Jacob Thompson, of Mississippi, were in full sympathy with their States and in constant touch with the progress of the secession movement in them and elsewhere. Moreover, they palsied the arm of the feeble President, and, by their official acts, strengthened the disunionists. So open was this official sympathy, that Cobb and Floyd resigned in December, 1860, loudly boasting of their services to the cause of secession.<sup>1</sup>

The conventions that passed ordinances of secession proclaimed them as the will of the people, save in Texas, where the governor, the famous Samuel Houston, vigorously opposing secession, delayed it as long as he could and kept the secessionists at bay. But they met in a convention, not legally called by the legislature and passed a secession ordinance on the first of February, 1861, which, on the twenty-third, was submitted to a popular vote. The returns showed its adoption, though the majority was meager.<sup>2</sup> From some districts there was no return. It is doubtful that the ordinance would have been adopted had the entire vote been cast. The "co-operation" secessionists were strongest in Alabama and Georgia. But "secession first; confederation afterwards" was the cry of the majority. Opposition to the secession ordinance, in each State, was to its form rather than to its substance, and those who hesitated to sign were among the loudest to pledge their support to whatever the State should decide to do. Thus when suddenly, amidst the heat of a revolution, citizens of a slaveholding State were compelled by public opinion to choose between

<sup>1</sup> For an account of The Cabinet Cabal see Nicolay and Hay's *Lincoln*, II, Chapter XVIII and Chapter XXV.

<sup>2</sup> See p. 590.

their State and the Union, with a reputed abolitionist as President, their decision was quickly made. The action of the States became also the immediate excuse for their representatives in Congress to retire and to join the secession movement openly.

On the fourth of February, 1861, delegates from seceding States met in Montgomery, Alabama, to carry out the program in the appeal of South Carolina, and to organize a Confederacy of the Slaveholding States. Though South Carolina in its convention (which remained in session, usurping the place of the legislature, till September seventeenth, 1862, when the State fell into the possession of the national forces), had advised a general convention, it was the Mississippi legislature, on the twenty-ninth of January, that, by formal resolutions, initiated the movement culminating in the Montgomery Convention. In less than a week, Louisiana, Florida, Georgia, South Carolina and Mississippi met together; Texas soon after came, and in four days a provisional constitution was adopted and a government was planned with the title of "The Confederate States of America." The very word *confederate* illuminated the meaning of the new movement; it stood, as it had ever stood, the antithetic of *national*; and the government now formed, for one year, its officers being chosen on the ninth of February, for that period, was to measure strength with the national government.<sup>1</sup>

The conventions of the seceding States had taken care to revise the State constitutions and, as in Mississippi, to annul all parts conflicting with the convention ordinances.<sup>2</sup> The Montgomery Convention modelled its work

<sup>1</sup> The proceedings of the Montgomery Convention were secret and never published.

<sup>2</sup> Amendment to the Constitution, adopted January 26, 1861. See Convention Journal, 117. This action is typical of that by the Conventions of 1860 and 1861, in other seceding States.

after the federal pattern. The provisional constitution was ordained and established by "the deputies of the Sovereign and Independent States of South Carolina, Georgia, Florida, Alabama, Mississippi and Louisiana."<sup>1</sup> It closely followed the national instrument, but not in the exact order. The importation of African slaves from any foreign country other than the slaveholding States of the United States was forbidden.<sup>2</sup> Congress should appropriate no money from the treasury unless it was asked for by the President or some one of the heads of the departments, except to meet running expenses or contingencies.<sup>3</sup> The Provisional President and Vice-President should be elected by ballot by the States represented in Congress, each State casting one vote, a majority being requisite to elect.<sup>4</sup> The Congress could amend the constitution at any time by a two-thirds vote. The somewhat incongruous provision that no State, without the consent of Congress, should enter into any agreement ("or enter into any treaty, alliance or confederation,") or compact with another State was taken, as also the definition of treason, from the national Constitution.<sup>5</sup> Under this compact, Jefferson Davis, of Mississippi, and Alexander Hamilton Stephens, of Georgia, were elected President and Vice-President. Thus there sprang into existence a Confederate Congress, consisting of the delegates sent to Montgomery by the conventions; a President and a Vice-President, chosen by them, and, by adoption, a body of administrative officials taken over from the United States, for nearly all the federal officials in the seceding States joined the secession movement.

<sup>1</sup> This was before N. C. and Virginia and Arkansas seceded.

<sup>2</sup> Art. I, Sec. VII, 1.

<sup>3</sup> Art. I, Sec. VII, 6.

<sup>4</sup> As in the Confederation of 1781.

<sup>5</sup> Art. I, Sec. VIII; Art. III, Sec. III, 1.

This brief outline of the events following the Dred Scott decision suggests how irreconcilable were its opposing opinions; how profoundly they shook the country, and, taking political form in the election of 1860, disclosed the impending dissolution of the Union. From this outline only one conclusion will be drawn, that the destruction of the Union was the chief Southern activity of the times.

With Buchanan and Breckinridge a new Congress had been chosen, the Thirty-fifth, in both of whose sessions the Democratic party had the majority in both Houses. Not until the Thirty-sixth Congress, which met on the fifth of December, 1859, was there a change in the party majority: the House of Representatives then for the first time passing into the control of the Republicans.<sup>1</sup> The new party displaced the old, as the old one, in its youth, sixty years before had displaced the Federalists. It seems hard to reconcile the charge of South Carolina against the North with the facts of these sixty years' control of the government by the Democratic party, and that party, during most of this period, wholly controlled by Southern statesmen. It might seem that during this long period, the South, in possession of the government, would have arranged all things in its own way. If in so long a period it had not done it, the question might be ventured,—Could it be done? Slavery had controlled Congress, the Executive, and, lately, had secured the Supreme Court itself: after that,—secession, and a slaveholding empire.

A stronger man than Buchanan might have confessed himself unable to solve the problem of 1860,—How shall the Union be preserved? The message which he sent to the Thirty-sixth Congress bemoaned "the long continued and intemperate interference of the Northern people with

<sup>1</sup> 101 Democrats; 113 Republicans; 23 Independents. From free States, 144; from slave, 90.



the question of slavery in the Southern States;" declared that the whole machinery of the Federal Government "for the distribution of remedial justice" had been demolished and put upon Congress the whole responsibility of saving the Union. The Southern States stood on the basis of the Constitution; the Northern States were the aggressors. Buchanan's suggestion of a remedy has already been given<sup>1</sup> an amendment of the Constitution to make slave property more secure and to make Congress its national guardian and ceaseless protector.

Congress responded by devoting the entire session to perfecting and passing such an amendment.

When, on the fourth of December, 1860, the reading of the President's message was completed, Clingman, a Senator from North Carolina, in making the usual motion for printing, took opportunity to discuss the state of the country. The abolitionists, he said, having elected a President would soon control all departments of the government. Retaining the forms, this sectional party would revolutionize the country.<sup>2</sup> But in sixty days a number of States would secede, and others were only deferring secession in hope of further guarantees. The South had no fear of the future. It was a country extensive enough to support three hundred millions of people. Its exports in 1859 were as many millions of dollars. A tariff of ten per cent would yield more than the Jackson administration had spent in its first year. A duty as small as this "would give life and impetus to mechanical and manufacturing industry throughout the entire South." Why should Northern Republicans wish to continue a connection with the South on any terms? "They declare African slavery to be a crime and that it must be abolished.

<sup>1</sup> See p. 593.

<sup>2</sup> Congressional Globe, December 4, 1860, pp. 3-4.

Parliament, in 1776, suggests a new meaning to the words of Mason, and others: that the Government, like the Confederation of 1781, had failed to meet the wants of the country. Let those States which were satisfied with it, continue to support it; the slaveholding States were going to abandon it. It was folly then to expect Congress to preserve the Union. This startling fact appeared, whatever the source of the remedy.

The Union consisted of three zones of States, extending east and west, preserving, to this late day, the three zones of settlement authorized under the charter of James I. The three zones, now, were the free States; the border States, and the cotton States. Though the border States were slaveholding, they were not for secession. Green, of Missouri, offered a resolution, on the fifth, providing for a border police that should prevent invasion of States by citizens of another, and efficiently execute the fugitive slave laws. Davis promptly pronounced it a quack remedy; a device to set up a military despotism; a means of coercing a State. His colleague, Brown, also saw in it a new engine of attack upon the South. But the Missouri Senator, though wholly out of sympathy with Northern ideas, declared that the Constitution was good enough for the Union. Public opinion there might re-act. What if power was soon to pass to an opposition President? "I do not stop to consider it," continued Green. "I will give him as much power to enforce the Federal Constitution and protect the rights of the people as I would anybody else; and I will hold him just as responsible for the manner in which he exercises it. Do you say that that gives him power to overawe the States? I say it does not. He cannot invade a single State; but he can prevent States from being invaded. He cannot take one article of your property; but he can protect your prop-

throw the Union. But the venerable John J. Crittenden, of Kentucky, whose service in the Senate began in 1817, when most of his present colleagues were schoolboys, boldly spoke sentiments that stirred echoes rarely disturbed in the Senate. "I do not agree," he said in direct answer to Clingman, "that there is no power in the President to preserve the Union. I will say that now. If we have a Union at all, and if, as the President thinks, there is no right to secede on the part of any State (and I agree with him in that), I think there is a right to employ our power to preserve the Union."<sup>1</sup> Coming from one of the border States, upon whose action the fate of the Union depended, his words were ominous for disunionists.

Lane, of Oregon, the late candidate for Vice-President, on the radical pro-slavery ticket,—declared that Lincoln's election conflicted with the equities of the Constitution and ought to be pronounced void; it stood for ideas inimical to fifteen States of the Union, deprived them of their equal rights to privileges in the territories and was an assurance of an "irrepressible conflict."<sup>2</sup> Brown, of Mississippi, scorned the notion of war. Who could suppose that South Carolina and sympathizing States would make war upon the North? "All we ask is that we be allowed to depart in peace." If this was not allowed, then "war would be inevitable."<sup>3</sup> "I should like to know," said Iverson, of Georgia, "where the power exists in the Constitution of the United States to authorize the Federal Government to coerce a sovereign State."

The only fault in the President's message was its inconsistency in declaring the Federal Government to be a consolidated government instead of a voluntary asso-

<sup>1</sup> Congressional Globe, December 4, 1860, p. 5.

<sup>2</sup> Id., December 5, p. 8.

<sup>3</sup> Id., p. 10.

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But he did not believe that the Federal Government would assume to attempt coercion, as the seceding States would draw all the Southern States after them.<sup>1</sup> It must be recorded, in justice to truth, that Southern leaders, in 1860, did not all advocate assassination as a means of securing slavocracy and secession. Wigfall, of Texas, quickly corrected Brown. A State could secede, with or without cause, and the Federal Government could, with or without cause, declare war. "I have no apprehension," said he, replying pointedly to Brown's words, "that the dagger of a Brutus will relieve us from what he regards as an incubus upon that State. I think that the people are not in the habit of committing acts of assassination." And then, with evident knowledge outlined the Texas program; "it may be that these people will be driven to revolution. It may be that, if their legislature is not called, they will meet in primary assembly, and of their own accord appoint delegates to a convention; and when they have done that, it will be for States which they offer to confederate with to decide whether they have a *de facto* government. A government *de jure* cannot be so formed, I know. But that violence will be done to any individual, I do not believe; nor do I believe that the Governor of that State will long persist in refusing to allow the people themselves to be heard and to declare whether they desire to remain longer confederated with abolition States." And he concluded with a simple explanation of secession. "We simply say that a man who is distasteful to us has been elected (President) and we choose to consider that as a sufficient ground for leaving the Union, and we intend to leave the Union."<sup>2</sup>

Jefferson Davis, of Mississippi, would make no remarks directly to the message. He said he was present as a

<sup>1</sup> Id., pp. 10-12.

<sup>2</sup> Id., p. 14.

Senator to perform his functions and before a declaration of war was made, against the State to which he was a citizen, he expected to be out of the Chamber; the sovereign State of which he was an ambassador would be found quite ready and willing to meet war.<sup>1</sup>

On the sixth, Powell, of Kentucky, offered a resolution that the part of the President's message relating "to the present agitated and distracted condition of the country, and the grievances between the slaveholding and the non-slaveholding States" be referred to a Committee of Thirteen, with instructions to report such amendments to the Constitution as might be necessary "to give certain, prompt and full protection to the rights of property of the citizens of every State and territory, and insure the equality of the States and the equal rights of all the citizens aforesaid, under the federal Constitution."<sup>2</sup> On the tenth the resolution was modified by its author; the committee should be instructed to report by bill or otherwise, and for a week the Senate discussed this change.

"Our Government," said Jefferson Davis, "is an agency of delegated and strictly limited powers. Its founders did not look to its preservation by force." Complaints were of long standing, but the people had now taken the matter into their own hands. "States, in their sovereign capacity, have now resolved to judge of the infractions of the federal compact, and of the mode and measure of redress." "The theory of our Constitution is one of peace, of equality of sovereign States. It was made by States and made for States." Therefore whatever Congress might choose to do, to solve the grave problem of union, it rested with the States, at last, to accept or reject its solution. Thus whether the Constitution was amended, or a bill, or a joint resolution was passed, guaranteeing

<sup>1</sup> Id., p. 12.

<sup>2</sup> Id., p. 19.

erty from being taken by others.”<sup>1</sup> And this, we now know, was substantially the position which President Lincoln claimed for himself in his inaugural.<sup>2</sup> Green plainly defined the purposes of Iverson, Davis, Mason and Wigfall. Right or wrong they were going out of the Union. They did not wish to preserve it, and every attempt to preserve it they called an attempt to set up a military despotism. Benjamin, of Louisiana, who for fifteen years had been meditating on a Southern Confederacy,<sup>3</sup> asked King, of New York, whether the party which had elected Lincoln intended to use physical force against a State which might think proper to withdraw from the Union; to which King replied, that the sentiment of the great body of the people of New York was that the Union “must and shall be preserved.” Evidently, the party of secession was determined to make much of prospective coercion and to use any sign of it as a sufficient excuse for disunion.<sup>4</sup>

But the cotton States wished the border States to go out with them. The reasons for this, and the terrible fear that impelled secession were plainly put by Iverson, after reviewing the history of slavery, under the Constitution, and the various compromises and laws for its security.

It had been customary among Southern men for nearly twenty years to complain that the personal liberty bills of some of the Northern States had prevented the execution of the fugitive slave law. Iverson went to the bottom of the matter when he said, that it was not these personal

<sup>1</sup> *Id.*, p. 31.

<sup>2</sup> *Lincoln's Works*, II, 1, 2.

<sup>3</sup> See my *Constitutional History of the American People, 1776-1850*, I, 425, 489.

<sup>4</sup> This conclusion is drawn from the speeches of the secession leaders, and especially that of Davis, quoted later, to which Trumbull replied, see p. 629.

liberty laws, but public sentiment at the North which had prevented the execution of the law. This sentiment was stronger than the law, therefore, the fugitive was not reclaimed. He scorned the idea that the law imposed damages on those who secreted or refused to deliver up slaves, and his scorn was logical, for he believed that a State was a sovereign power and could not be sued. As he expressed it, there was no way of making the State of Massachusetts liable, if its people seized a thousand slaves and refused to surrender them; hence his first conclusion, that a stricter fugitive slave law would be valueless.

It had been proposed, in order to appease the South, that the doctrine should be made a law that Congress must protect slavery in the territories. But the Republican party was a unit against any such legislation. They had fought the recent bill on that issue and had won, and the principle that slavery should never advance one inch beyond its existing boundary and never plant a foot on the United States, was at the basis of their organization, therefore, legislation of the protective kind indicated, was impossible. Moreover, many Northern Democrats opposed the doctrine, of whom those constituting "The Douglas-non-interference-squatter-sovereignty-party" would equal the Republicans in opposing the doctrine. It was futile, therefore, for the South to get congressional protection for its slave property by law, and yet the Southern people would never be satisfied with anything else. The Wilmot proviso, non-interference and squatter sovereignty, would lead to the total and eternal exclusion of the Southern people from their share of the territory of the United States, a deprivation and wrong to which they would never submit. The object and ultimate end of all anti-slavery restriction was to circumscribe the area of slavery and compel the South to get rid of its slaves. As soon as the



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Republican party was seated in power the government would be divorced from slavery. The mails would be used to disseminate seditious writings and servile insurrections would follow. Slavery would become a burden instead of a blessing to the South, and the border States in a few years would be compelled to throw their influence into the Northern scale. The slaves would be concentrated in the more southerly slaveholding States, and in less than twenty years would far outnumber the white population. Then universal emancipation would be decreed by the federal government, and such a deadly contest between the two races would follow as had never been known in the world's history. However unreasonable this fear it was a real terror to many Southern men. They looked forward with grave anxiety to the time when the slave population would outnumber the white. And these dangers were depicted in lurid colors in Alabama when it seceded.<sup>1</sup>

The loyal people of Missouri<sup>2</sup> and other border States complained that the cotton States were to blame for the secession movement now in progress, and that these States had no right to take them out of the Union against their will, to which Iverson replied that the border States had no right to keep the cotton States in the Union against their will. As the States were sovereign and independent and had the right to decide these questions for themselves, let those who wished to remain in the Union remain there. But the border States were short-sighted, and unlike those of the Gulf of Mexico and along the Atlantic they did not understand the great revolution going on. The cotton States clearly foresaw what was coming in the Union: universal emancipation, and an attempt to turn loose

<sup>1</sup> Smith's Alabama Debates, 1861, 201, et seq.

<sup>2</sup> See Vol. III, p. 43.

upon society at the South a mass of corruption which emancipation would engender. The border States could get along without slavery; a subject which was discussed exhaustively in Kentucky in 1849.<sup>1</sup> But the cotton States were obliged, he said, to have African slaves to cultivate their cotton, their rice and their sugar.<sup>2</sup> The slave was property and his protection was essential to the prosperity of the South; a dogma repeated from colonial times till the abolition of slavery. The cotton States had voted for Breckinridge and Lane at the Presidential election of 1860, because they stood for congressional protection to slave property in the territories.<sup>3</sup> The small party in the South opposed to that principle had supported Douglas, but in the Southern States it was so small as to be contemptible.<sup>4</sup> Southern men who supported the Bell and Everett ticket favored congressional protection to slavery, but a large portion of them were ardent supporters of the secession movement and especially because they had lost all hope of getting protection for slavery if they remained in the Union. Legislation or an amendment to the Constitution which fell short of permanent protection for slavery would not be accepted by the South. But the South was satisfied that there was no prospect of getting such legislation, therefore, Crittenden's resolutions were unnecessary and useless.

If the North yielded and gave the Southern States addi-

<sup>1</sup> See my Constitutional History of the American People, 1776-1850, Vol. II, 1-170.

<sup>2</sup> Discussed at length in the Alabama Convention, 1861; Smith's Debates, 194-211.

<sup>3</sup> Platform Breckinridge Democratic Convention, Baltimore, June 11-23, 1860.

<sup>4</sup> Douglas had carried but one slave-holding State, Missouri, having nine electoral votes, and giving him 58,801 popular votes.

tional constitutional guarantees, the grant would spring only from an apprehension that the South was going to dissolve the Union; a concession made under such circumstances would be of little value to the South. Northern pledges would be valueless as long as a vitiated public sentiment toward slavery existed in the heart and minds of Northern people. The doctrine of the irrepressible conflict was taught at the North from every pulpit, every popular assembly, every schoolhouse. This Northern sentiment was beyond reform. The Union, therefore, was doomed.

It was twenty-five years since the anti-slavery agitation began; then the abolitionist could muster but seven thousand votes, now they had increased to one million eight hundred and fifty thousand votes.<sup>1</sup> Through all these years the South had threatened to dissolve the Union if its expostulations continued to be ignored, and though it had been in control of the Federal government and its patronage, it had not been able to restrain the growth of the anti-slavery vote.

The secession movement included the States west of the Mississippi. If the border States desired any influence or part in the new Confederacy they must leave the Union quickly and send delegates to join in forming a constitution and organizing a government for the protection of slavery.<sup>2</sup> It was not impossible that this would be done before they arrived. If the cotton States alone formed the Confederacy they might reopen the African slave trade and thus destroy the great monopoly of the

<sup>1</sup> The vote for James G. Birney, 1840, was 7,059; in 1844, 62,300; for Martin VanBuren, 1848, 29,263; John P. Hale, 1852, 156,149; John C. Fremont, 1856, 1,341,264; Abraham Lincoln, 1860, 1,865,913.

<sup>2</sup> See Vol. III, p. 47.

negro market which Maryland, Virginia and North Carolina had so long possessed.<sup>1</sup>

Though Iverson was not a foremost leader of the secession movement this speech of his delivered in the United States Senate six days before South Carolina assembled in convention to pass a secession ordinance, remains the unconcealed exposition of the thought and purpose of the South in 1860. If all that he said was true, it may be asked why did Southern Senators delay in Washington? Why not join their constituency and hurry forward the program of secession agreed upon? The reason was obvious, they lost nothing by remaining at the capital. They and their friends were yet in control of the Federal government, and were exercising their vast powers to the best of their ability in furthering the ends of secession. By remaining they could participate in whatever action might be taken at an unguarded moment to put the national government in a state of defense, and by their votes paralyze the efforts in that direction. They were playing a bold but easy part, but they knew their ground thoroughly.

Senator Pugh, of Ohio, ventured to correct Iverson's statement that violations of the fugitive slave law had cost Virginia one hundred thousand dollars a year. He said that the statement was not only untrue of Virginia, but of the whole South since the act of 1793 was passed, and Douglas remarked that the law had been enforced "with as much fidelity as that in regard to the African slave trade." Secession quite monopolized the debate. Seward, Sumner and Chase believed that the day of deliverance was at hand when the government should pass into the control of the Republicans, and they kept silent. But Wade of Ohio, the most radical Republican

<sup>1</sup> *Globe*, December 11, 1860, pp. 50, 51; *Smith's Alabama Debates*, 1861, p. 198.

in the Senate, would not allow Iverson to go unanswered, and his reply embodied the best exposition made during this session, of the principles of the new party.

The Southern Senators, said Wade, represented but little more than one-quarter of the free people of the United States, and yet their counsels had prevailed for at least ten years, and the party which they represented had also been in the majority in the cabinet and in the Supreme Court. Was it not strange, therefore, that they should now complain that their rights were struck down by the government? If anything in the Federal legislation was wrong they were responsible for it, for the Republican party had never for one hour been invested with sufficient power to modify or control federal legislation; therefore, when Senators justified the overthrow of the government they were acting merely upon the suspicion that the Republicans might somewhat affect their rights or violate the Constitution. The Republicans, he said, held no principle which had not had the sanction of the government in every department for more than seventy years. On the question of slavery it stood where Washington, Jefferson, Madison and Monroe had stood, and where Adams, Jackson and even Polk had stood. It was the men of the South who had changed their opinions. The only legislation of which the South could complain was furnished by some evidence of hostility to slavery in the liberty laws of some of the Northern States. But the opinions embodied in these laws were held by the civilized nations of the world. All agreed that the day of compromises was at an end. The most solemn compromise had been violated without scruple, and one that had stood for more than thirty years had but recently been swept from the statute books by the Kansas-Nebraska act. The friends and foes of slavery extension had made it the great issue at the recent elec-

tion. "The plainest and most palpable issue that was ever presented to the American people and one that they understood best;" and the majority had voted against slavery extension. Dissatisfied with this result, the South claimed the constitutional right to secede at pleasure and set up an adverse government for which, said Wade, "I can find no warrant in the Constitution." If the principle of secession was right there must be an end to all government. "As to South Carolina," said he, "I will say that she is a small State; and probably if she were sunk by an earthquake to-day we would hardly ever find it out except by the unwonted harmony that might prevail in this chamber."

If a State seceded, although the government would not make war upon her, it could not recognize her right to be out of the Union, and she would not be out until she had gained the consent of the Union itself. Whoever was President he would find it his sworn duty under the Constitution to execute the law everywhere in the Union, and that he could not be released from that obligation. He must collect the revenues precisely in the same way and in the same extent as they were collected in every State. The Constitution demanded that he should do it alike in the ports of every State. If he were forced to close the ports of entry, trade would cease. If he compelled collection, the State would not have gained independence by secession. The consequence must be obedience to the laws or the State must take the initiative and declare war upon the United States. Force must be met by force; secession would end in war, and the act of levying war would be treason against the United States. That, concluded he, is where it results; we might just as well look the matter right in the face.<sup>1</sup> Not since that day when Web-

<sup>1</sup> Globe, December 17, 1860, pp. 99, 104.



ster replied to Hayne, had such language been heard in the Senate. The effect of the speech at the North was transcendent. Wade had put the power and character of the government in plain language and in a clear light. He was the first Senator to say boldly that the Nation would defend itself; and from the day of his speech a word familiar to the fathers came into more common use. The American Union was henceforth spoken of as the Nation, instead of the Confederacy. Crittenden, the venerable Senator from Kentucky, had declared his faith in the Union and in its right and power of self-defense. Wade had gone no further, he had only used more burning words and boldly disclosed the tragedy of the situation.

Secession meant treason, civil war and all its consequences. The laws of the Nation would be executed; the fearful consequences of resisting them would rest upon those who had instigated, and who might attempt, secession.

If Wade's speech seems extreme, like Iverson's, we must remember that the country was at the threshold of a great revolution. Its political institutions were about to be revised. No man could see the end. But the tendency of the times was as clear to the leaders of the people as to us who come after. Two civilizations were protected by the Constitution. Both could not survive. Each had found a voice. The issue was made up. Secession, disunion, a slaveholding Confederacy had spoken. So had the Nation. Its purpose could not be mistaken. "I stand by the union of these States," concluded the Ohio Senator. "Washington and his compatriots fought for that good old flag. It shall never be hauled down, but shall be the glory of the Government to which I belong, as long as my life shall continue. To maintain it, Washington and his compatriots fought for liberty and the rights of man. And

here I will add that my own father, although but a humble soldier, fought in the same great cause, and went through hardships and privations sevenfold worse than death, in order to bequeath it to his children. It is my inheritance. It was my protector in infancy and the pride and glory of my riper years; and, although it may be assailed by traitors on every side, by the grace of God, under its shadow I will die."<sup>1</sup>

Iverson's apology for confederacy and secession was made on the eleventh; Wade's defense of the Constitution and the Nation, on the seventeenth. Midway between these dates two proclamations had appeared, not for the same purpose, but yet effecting it, and showing, plainly, the futility of every hope for compromise. The President's message had strengthened the party of secession. When a rebellion is about to break out, the executive magistracy weakens its cause by sounding a single note of despair. But Buchanan's message was a dirge, a national funeral march. On the fourth of December he summoned the American people, by proclamation, to assemble, on the coming fourth of January, for humiliation, fasting and prayer; the State was in confusion; the masses without work and many without food, and the Union "threatened with alarming and immediate danger."<sup>2</sup> Whatever the President's motives may have been, his proclamation did not help the national cause. Aggressive nationalists believed that it was a time for action. To the secessionists, the President's dismal appeal was a sign of a federal collapse. What further evidence was needed?

It was probably by accident that the leaders of the secession movement issued their manifesto on the very day of

<sup>1</sup> Congressional Globe, December 17, 1860, pp. 99, 101, 103, 104.

<sup>2</sup> Richardson omits this proclamation. It may be found in the Washington Constitution for December 15, 1860, and is given, in part, in Nicolay and Hay's Lincoln, II, 435.

the President's proclamation.\* It was the call to the clans. Within six days South Carolina responded; within sixty, seven States had obeyed and assembled to form a Southern Confederacy.

**\*ADDRESS OF CERTAIN SOUTHERN MEMBERS OF CONGRESS.**

To Our Constituents.<sup>1</sup>

Washington, Dec. 14, 1860.

The argument is exhausted. All hope of relief in the Union through the agency of committees, Congressional legislation, or constitutional amendments is extinguished, and we trust the South will not be deceived by appearances or the pretenses of new guarantees. In our judgment the Republicans are resolute in the purpose to grant nothing that will or ought to satisfy the South. We are satisfied the honor, safety, and independence of the Southern people require the organization of a Southern Confederacy—a result to be obtained only by separate State secession—that the primary object of each slaveholding State ought to be its speedy and absolute separation from a Union with hostile States.

J. L. Pugh<sup>2</sup> of Alabama.

David Clopton of Alabama.<sup>3</sup>

Sydenham Moore of Alabama.

J. L. M. Curry<sup>2</sup> of Alabama.

J. A. Stallworth of Alabama.

J. W. H. Underwood of Georgia.

L. J. Gartell of Georgia.

James Jackson of Georgia.

John J. Jones of Georgia.

Martin J. Crawford of Georgia.

Alfred Iverson,

U. S. Senator, Georgia.

George S. Hawkins of Florida.

T. C. Hindman of Arkansas.

Jefferson Davis,

U. S. Senator, Mississippi.

A. G. Brown,

U. S. Senator, Mississippi.

Wm. Barksdale of Mississippi.

O. R. Singleton of Mississippi.

Reuben Davis of Mississippi.

Burton Craige of North Carolina.

Thomas Ruffin<sup>2</sup> of North Carolina.

John Slidell,

U. S. Senator, Louisiana.

J. P. Benjamin,

U. S. Senator, Louisiana.

J. M. Landrum of Louisiana.

<sup>1</sup> Washington Constitution, December 15, 1860. Given in Nicolay and Hay's Lincoln, II, 436.

<sup>2</sup> Member of the Alabama Convention of 1861. Clopton was appointed by it, a commissioner to Delaware; Curry, to Maryland. See Journal, 35. Curry was also elected a deputy to the Provisional C. S. A. Congress, Id., 161.

<sup>3</sup> Members of the North Carolina Convention, of 1861; also of the Peace Conference.

Louis T. Wigfall,  
U. S. Senator, Texas.  
John Hemphill,  
U. S. Senator, Texas.  
J. H. Reagan of Texas.  
M. L. Bonham<sup>1</sup> of South Caro-  
lina.

Wm. Porcher Miles,<sup>2</sup>  
Of South Carolina,  
John McQueen<sup>3</sup> of South Caro-  
lina.  
John D. Ashmore of South Caro-  
lina.

The signers of this address bore a conspicuous part in the later history of the Confederacy.

Jefferson Davis became its President. He appointed Judah P. Benjamin Attorney General, Feb. 21, 1861; Secretary of State, Feb. 7, 1862. John H. Reagan, Postmaster General, March 6, 1861, and March 22, 1862. J. L. Pugh became a member of the first and second Congresses; David Clopton, Id.; J. L. M. Curry, of the Provisional, and of the first; L. J. Gartell, a member of the first; Martin J. Crawford, of the Provisional; A. G. Brown, a Senator, first and second Congresses; O. R. Singleton, a member of the House, first and second; Reuben Davis, a member of the House in the first; Burton Craige, a member of the Provisional Congress; Thomas Ruffin, Id.; John Slidell was appointed a commissioner to European powers and with James H. Mason was a party to the Trent affair; Louis T. Wigfall was a member of the Provisional Congress and a Senator in the first and second; J. H. Reagan was a member of the Provisional; M. L. Bonham, a member of the first; Wm. Porcher Miles, a member of the Provisional, the first and the second; John McQueen, a member of the first.

This address was flatly at variance with the course Congress was taking, for in both Chambers measures for compromise were under way. In the House a committee, of one member from each State, had been appointed on the fifth, and to this Reuben Davis belonged. He knew that in this committee, the resolution offered by Justin S. Morrill, of Vermont, that "any reasonable, proper, and constitutional remedy necessary to preserve the peace of the country and the perpetuation should be promptly and cheerfully granted" had been voted down by twenty-two

<sup>1</sup> M. L. Bonham was chosen by it a commissioner to Mississippi.

<sup>2</sup> Member of the South Carolina Convention of 1861.

<sup>3</sup> Chosen by it a commissioner to Texas.

nays to nine yeas,<sup>1</sup> and Davis had declared, on the floor, that he served on the committee for the purpose of keeping the South informed of the course of affairs.<sup>2</sup> Testing the address at any point, save that of the fixed purpose of its authors, it was false to history, but it was true to slavocracy. When, on the eighteenth, the Senate agreed to the appointment of a Committee of Thirteen, and on the twentieth, the Vice-President named its members, no Senator had confidence that its recommendations would clear the political sky, and few believed that it could arrive at any unanimous conclusion other than to disagree. The Vice-President remarked that he had found great difficulty in making up the list and, naming Powell, the junior Senator from Kentucky, and the author of the motion, as chairman, he next named the senior Senator, Crittenden, an unusual procedure, but proper under the circumstances. The Senators from a State are rarely placed on the same committee. The Vice-President and the Senate knew that a Committee of Compromise, in 1860, without Mr. Crittenden would be as incomplete as one without Henry Clay, in 1850. The thirteen, now appointed, combined large experience in public affairs; represented the four parties into which the country was lately divided, and promised all that could be hoped for in the condition of things.<sup>3</sup>

<sup>1</sup> H. R. Report No. 31, 36th Congress, 2d Session, Journal of the Committee, p. 7.

<sup>2</sup> Globe, December 11, 1860, p. 59.

<sup>3</sup> The committee was as follows, the politics and senatorial service of each being also indicated:

Lazarus W. Powell (D.), Kentucky, 1859-65.

John J. Crittenden (D.), Kentucky, 1817-1821, 1841-1849, 1855-1861.

R. M. T. Hunter (D.), Va., 1847-1863.

Wm. H. Seward (R.), N. Y., 1849-1861.

Robert Toombs (D.), Ga., 1853-1861.

Stephen A. Douglas (D.), Ill., 1847-1863.

Jefferson Davis promptly requested to be excused from service, on account of the position he was known to occupy, and by a vote of the Senate his wish was granted. But on the following day, Yulee, of Florida, moved the reconsideration of the vote, and requested Davis to yield to the desire of his friends and remain on the committee in order to represent their section of the country. After some difficulty in getting a quorum, the Senate, surprised at the reconsideration, agreed to it; Davis himself gracefully surrendering to his friends. It was a coyish episode, at best, and has been explained as part of that plan which Reuben Davis, also of Mississippi, was carrying out in the House Committee of Thirty-three.

On the day when the Senate committee was appointed, South Carolina passed her ordinance of secession. The movement was now afoot. By remaining on the committee, Jefferson Davis would know every step of conciliation, would be better able to help on if not to direct the scheme of a Southern Confederacy, and, at the same time, to appear to be earnestly engaged in the patriotic labor of attempting to save the Union.<sup>1</sup> Thus the man foremost in attempting to dissolve the Union was restored to the committee which people, who saw only the surface of affairs, believed might report the Compromise of 1860. The committee agreed to be governed by a rule suggested by Mr. Davis, that no proposition should be reported as adopted unless sustained by a majority of each of the two

Jacob Collamer (R.), Vt., 1855-1867.

Jefferson Davis (D.), Miss., 1847-1853, 1857-1861.

Benj. F. Wade (R.), O., 1851-1869.

Wm. Bigler (D.), Pa., 1855-1861.

Henry M. Rice (R.), Minn., 1857-1863.

James R. Doolittle (R.), Wis., 1857-1869.

James W. Grimes (R.), Ia., 1859-1871. Resigned in 1869.

<sup>1</sup> See Speech of Senator Trumbull, January 10, 1861; *Globe*, §12.

classes of Senators on the committee: the Republican members to constitute one class, and Senators of all other parties, the other. As the Republicans were only five<sup>1</sup> and Senators of "other parties" eight, and the Democrats were of widely differing opinions, there was not much prospect of adopting any resolution, under the rule. The committee met six times, discussed propositions submitted by seven of its members and reported on the last day of the year. Senator Toombs would have the Constitution amended to give the people of the United States an equal right to emigrate and settle with slave property in the territories; there it should be protected; the territory should declare for itself, at the time of its admission, whether it would become a free or a slave State. The Federal Government should protect slave property like any other; but any State could regulate its own domestic institutions. Fugitive slaves should be given up like other criminals, the law of the State from which they fled determining the criminality. Persons disturbing the tranquillity of the people of any State should be punished by federal law. Fugitive slaves should be surrendered under the act of 1850 and not be entitled to either a writ of habeas corpus or to trial by jury, or to other obstructions of legislation in the States to which they might flee. No law in relation to slavery in the States or territories should ever be passed by Congress without the consent of a majority of the Senators and Representatives from slaveholding States. None of these new provisions, nor others relating to slavery in the Constitution (except that on the African slave trade) should ever be altered, except by the consent of each and all of the slaveholding States.

Jefferson Davis was briefer. His amendment was the

<sup>1</sup> See note, p. 618, *supra*.

slave clause of the Lecompton constitution nationalized. Property in slaves, recognized as such by the local law of any State in the Union, should stand on the same footing, in all constitutional and federal relations, as any other species of property, and, like other property, should not be subject to be divested, or impaired by the local law of any other State, either in escape, or during the transit or the sojourn of the owner; and in no case whatever should such property be subject to be divested or impaired by any legislative act of the United States, or of any territory. This, in new form, was the pro-slavery plank in the Breckinridge platform of 1860.<sup>1</sup>

Crittenden submitted three amendments:

The Missouri Compromise line of 1820 should be restored, and extended across the country. Congress should not abolish slavery in places under its own jurisdiction, situated within slave States, nor in the District of Columbia, without the consent of its inhabitants, nor without compensation, nor so long as Maryland and Virginia were slave States. Transportation of slaves from one State to another or to a slave territory should not be prohibited; the fugitive slave law should be more strictly enforced, and the United States should pay for the slave if he escaped, but should have recourse to the county in which the escape was effected, which, in turn, should recover damages from the rescuers. But no future amendment should affect the slave clauses in the Constitution: they should be beyond amendment.

The fugitive slave law of 1850 should be made more effective, and the African slave trade suppressed. Except in the territory of New Mexico, slavery north of 36° 30' should be prohibited, but the territory might be divided

<sup>1</sup> See pp. 557-558.



at the discretion of Congress and new States admitted, slave or free, as their people might decide.

Senator Douglas submitted the only plan that touched on the citizenship of free persons of color. Congress should make no law as to slavery in a territory, but its condition under the act of 1850 should continue till the territory, with whatever boundaries it received from Congress, should have a population of fifty thousand white inhabitants. Then it could form a constitution, slave or free. New territory should be acquired only with the concurrent vote of two-thirds of both Houses; the status of slavery should continue as at the time of its acquisition and then be determined by the constitution ultimately adopted by its people. New States should have an area of not less than sixty nor more than eighty thousand square miles.<sup>1</sup> The fugitive slave law should be executed in States and territories alike.

"The elective franchise and the right to hold office, whether federal, State, territorial or municipal," should "not be exercised by persons of the African race, in whole or in part." But the United States should be empowered to acquire, as might be needed, districts of country in Africa and South America for the colonization of such free persons of color as the States might wish to have removed there.<sup>2</sup> This plan for prohibiting the abolition of slavery in the District of Columbia and in other fed-

<sup>1</sup> The equalization of the basis of representation was a subject of earnest discussion in the constitutional conventions of the States, beginning about 1845, and had been continued ever since. For typical discussions of district areas and population see the debates in the conventions of Louisiana, 1845; Kentucky, 1849; Michigan, 1850; Minnesota and Iowa, 1857.

<sup>2</sup> For an account of the condition of free persons of color, in the United States, see my *Constitutional History of the American People, 1776-1850*, Vol. I, Ch. XII.

eral territory was the same as Crittenden's. Like him, Douglas would suppress the slave trade; would make the United States responsible for the escape of fugitive slaves, and would have all slavery amendments beyond amendment in the future.

Seward, who may be considered the leader of the Republicans in the Senate, proposed an amendment that may be taken as the Chicago platform of 1860 in the guise of a constitutional amendment, but expressed in negative form. No amendment should be made that would authorize Congress to abolish or interfere with slavery in a State.<sup>1</sup> The fugitive slave act of 1850 should be so amended as to give the alleged fugitive a jury trial. The State legislatures, at the request of Congress, should review all their legislation and repeal, or modify, that which contravened the Constitution and the acts of Congress.

Senator Bigler, of Pennsylvania, like Crittenden, would restore the line of the Missouri Compromise, and would organize four territories to the South, ultimately to be slave States; and eight to the North, ultimately to be free. He would continue slavery in the District of Columbia as long as it continued in Virginia and Maryland, but would make no more slavery amendments nor abolish these new ones.

Senator Rice, of Minnesota, would restore the line of 36° 30', and organize all territory north of it as the "State of Washington," and all south as the "State of Jefferson." As soon as one hundred and thirty thousand people were inhabitants of sixty thousand square miles of this area, he would form them into a new State with such boundaries as Congress might prescribe. This

<sup>1</sup> See note, p. 553.

fluous. But it touched a vital question and one which was to be decided in a very different way before ten years were passed. At this time the free colored population of the country numbered four hundred and eighty eight thousand and had increased slightly over fifty thousand in ten years. It was about one-eighth of the slave population<sup>1</sup> and was unwelcome in every part of the country. Douglas had the wild dream of colonization in Africa or South America; that abstraction which had promised relief for half a century. Doubtless Douglas knew the danger to slavery in a free population. The existence of nearly a half million of this class in a Republic, which was straining its resources to make slavery permanent in the slaveholding States, and in the Territories if possible, and perhaps extend the institution southward indefinitely over Mexico, Central America and beyond the Amazon, was a dangerous anomaly which Douglas recognized. He was not lacking in astuteness, and he knew that pacification of the country, as long as free persons of color were allowed any political rights, must be impossible.<sup>2</sup>

On the ninth of January, Daniel Clark of New Hampshire gave notice that when Crittenden offered his resolutions he should propose, as a substitute:

“That the provisions of the Constitution are ample for the preservation of the Union and the protection of all the material interests of the country; that it needs to be obeyed rather than to be amended, and that an extrication from the present dangers is to be looked for in strenuous efforts to preserve the peace, protect the public

<sup>1</sup> Eighth Census, Preliminary Report, 7.

<sup>2</sup> The importance of this factor in the slavery question has been much overlooked. The issue was essentially one of the extension of the franchise.

property and enforce the laws, rather than in new guarantees for particular interests, compromises for particular difficulties or concessions to unreasonable demands.

"That all attempts to dissolve the present Union, or overthrow or abandon the present Constitution, with the hope or expectation of constructing a new one, are dangerous, illusory and destructive; that in the opinion of the Senate of the United States no such reconstruction is practicable, and, therefore, to the maintenance of the existing Union and Constitution should be directed all the energies of all the departments of the government, and the efforts of all good citizens."<sup>1</sup>

This accorded fully with the Union sentiments in Wade's speech and was heartily supported by all the Republican Senators. When, on the sixteenth the Crittenden resolutions were up, Clark's resolutions were agreed to by a vote of twenty-five to twenty-three. Six Southern Democrats had abstained from voting. Knowing the end of the political game, why should they vote? Their hearts were with the new government to be formed in a few days at Montgomery, and their refusal now to vote against the Clark substitute for Crittenden's resolutions simply meant hostility to compromise and a declaration of secession principles.

On the day when the Clark resolutions were proposed, the President sent a special message to Congress urging "action, prompt action," but declaring that while he believed that "no State has a right by its own act to secede from the Union," and that he had no authority to recognize such independence, neither had he authority to prevent it. The message was another confession of impotency, than which nothing else was now expected

<sup>1</sup> These resolutions, and those offered in the House, are given at the close of the chapter.

from Buchanan. The President accompanied the message with the correspondence of Barnwell, Adams and Orr, the three South Carolina commissioners appointed by the Convention in that State to settle terms between it and the United States,<sup>1</sup> a transaction which the President had declined to enter into. He refused to meet the commissioners or to receive their communications.<sup>2</sup> His decision was promptly translated into an insult and an act of war by the secessionists, and interpreted as a sign of future attempts at coercing the seceding States.<sup>3</sup> To the leaders in disunion it was gratifying because it widened the breach and hardened the pride of slavocracy. It was another Southern grievance and injury. In a brief speech, Jefferson Davis, who had succeeded in having the communication from the commissioners to the President read in the Senate, treated the President's action as the rejection of the olive branch and expressed his pity for him and for the country.<sup>4</sup> It was the pity which the conspirator feels for him who resists his schemes. Davis was far too astute a man not to detect the advantage to the cause of secession which Buchanan's negative conduct afforded. On the following day, in an elaborate and powerful speech, Davis attempted to refute the doctrine stated in the message in the words: "I certainly have no right to make aggressive war upon any State, and

<sup>1</sup> For the correspondence, see *Journal of South Carolina Convention, 1860*, 484-502.

<sup>2</sup> For a history of the transaction, see Nicolay and Hay's *Lincoln*, II, Chapters XXIII, XXIV.

<sup>3</sup> See the "Statement" of Miles and Keitt, *S. C. Convention Journal*, 498-499. Also Jefferson Davis's speech in the Senate, January 9, 1861. *Globe*, p. 289, and January 10. *Id.*, 306-312. See *Smith's Alabama Convention*, p. 168.

<sup>4</sup> In his speech of January 9, he had succeeded in having the letter of Barnwell, Adams and Orr read in the Senate. (See *Globe*, for January 9, 1860, pp. 288-9.)

I am perfectly satisfied that the Constitution has wisely withheld that power even from Congress," which Davis pronounced "very good;" "but the right and the duty to use military force defensively against those who resist the Federal officers in the execution of their legal functions, and against those who assail the power of the Federal Government, is clear and undeniable." Davis summed his comments on this in the words: The general government has "no power to coerce a State." To retain United States troops in the forts at Charleston against the wishes of South Carolina was coercion and a violation of the Constitution. The clear purpose of the secessionists was to put the national Government, as it had put the free States, in the wrong; thus the South, to escape tyranny and aggression had seceded. The reply to all this was made by Trumbull, of Illinois. "We have listened to the Senator from Mississippi, and one would suppose, in listening to him here, that he was a friend of this Union, that he desired the perpetuity of this government. He has a most singular way of preserving it, and a most singular way of maintaining the Constitution. What is it? Why, he proposes that the government should abdicate. If it will simply withdraw its forces from Charleston we will have peace. He dreads civil war, and he will avoid it by a surrender. He talks as if we Republicans were responsible for civil war, if it ensues. If civil war comes, it comes from those with whom he is acting. Who proposes to make civil war but South Carolina? Who proposes to make civil war but Mississippi and Alabama, and Georgia, seizing, by force of arms, upon the public property of the United States? Talk to us of making civil war. You inaugurate it, and then talk of it as if it came from the friends of the Constitution and the Union. Here stands this great govern-

ment; here stands the Union—a pillar, so to speak, already erected. Do we propose to pull it down? Do we propose undermining the foundations of the Constitution or disturbing the Union? Not at all, but the proposition comes from the other side. They are making war, and modestly ask us to have peace by submitting to what they ask. It is nothing but rebellion; it is nothing but insurrection.”<sup>1</sup>

The nominal difficulty in working out a new compromise was the territories and the unorganized public domain. These were the bone of contention. If Congress could get rid of the territories the question of slavery would be settled. On the sixteenth of January, when Clark's resolutions were substituted for those so long and so earnestly advocated by Crittenden, Senator Rice suggested a scheme for obliterating the Territories. Kansas and New Mexico should be admitted, the boundaries of Minnesota, California and Oregon be readjusted, and thus, all the land be occupied as States. But this unique treatment of the disease may be said to have commended itself neither to the doctors nor to the patient. Slavocracy did not want the question settled, and the United States was a slaveholding Republic. When remedies become whimsical there is little hope for the patient.<sup>2</sup>

Secession was the inevitable consequence of slavocratic policy and ideas, and was itself the flower and fruit of the institution of slavery. The South Carolina declaration contained much history as well as much sophistry. Any one who will give a moment's thought to the subject must admit the truth of the saying that “A house divided against itself cannot stand.” The balance of power

<sup>1</sup> *Globe*, January 10, 1861, pp. 312-313.

<sup>2</sup> For the resolutions see *Senate Journal*, 103, 104.

between slave States and free was forever broken with the admission of California in 1850. When, eight years later, in his Springfield speech, Lincoln declared his belief that "this government cannot endure permanently half slave and half free," that he did not expect the Union to be dissolved, did not expect the house to fall, but did expect it would cease to be divided; that it would become all one thing or all the other; that "Either the opponents of slavery will arrest the further spread of it, and place it where the public mind shall rest in the belief that it is in the course of ultimate extinction; or its advocates will push it forward, till it shall become alike lawful in all the States, old as well as new; North as well as South;"<sup>1</sup> he used homely language that everybody could understand and advanced a philosophy which everybody believed. He spoke for the South as truthfully as for the North. He, and the party which elected him President, opposed the existence of slavery in the territories. But the South Carolina declaration promptly expressed the deduction: "If it is right to preclude or abolish slavery in a territory, why should it be allowed to remain in the States?"<sup>2</sup> The "requisitions of an inexorable logic" led slavocracy to believe that there was but one conclusion of the whole matter, if the Union continued, and that conclusion was emancipation. Thus the fate of the slave would be the fate of the Union. While secession was strengthening and the dissolution of the Union seemed speedy and inevitable, a final effort was made to compromise all differences by amending the Constitution, and make slavery national and perpetual.

<sup>1</sup> Political Debates between Lincoln and Douglas, p. 1.

<sup>2</sup> See the address of the Georgia Convention of 1861, Journal, pp. 109-111.



## CHAPTER VI

### THE REJECTED AMENDMENT OF 1861.

Meanwhile, a remedy for the Nation's ills was sought in a different quarter. Virginia was trying the part of the peacemaker. On the nineteenth of January its General Assembly appointed commissioners and invited the other States to join her, to meet in Washington, on the fourth of February, "in an earnest effort to adjust the present unhappy controversies, in the spirit in which the Constitution was originally formed, and consistently with its principles, so as to afford to the people of the slaveholding States adequate guarantees for the security of their rights." While this invitation to join in a peace conference was on its way to the several States, Senators and Representatives from seceding States were delivering their farewells in Congress. Davis of Mississippi, Mallory and Yulee, of Florida, and Clay and Fitzpatrick, of Alabama, on the twenty-first, formally announced the secession of their States and their consequent retirement from the Senate.<sup>1</sup> Three days later, Ex-President Tyler, one of the Virginia commissioners, delivered a copy of the Assembly resolutions to the President, who, hailing the movement with lively satisfaction, sent the resolutions to Congress on the twenty-eighth, with a special message. Virginia had appointed Tyler a commissioner to the President, and Judge John Robertson one to South Carolina. The President and the State were requested to agree to abstain, pending the action of the peace conference, "from all acts calculated to produce a collision of arms between the States and the government of the United States."

<sup>1</sup> *Globe*, December 21, 1861, pp. 484-487.

"However strong may be my desire to enter into such an agreement," said the President in his message, "I am convinced that I do not possess the power." That rested with Congress alone under the war-making power. But Buchanan urged Congress to accede to the request of Virginia.<sup>1</sup>

Judge Robertson found South Carolina in no mood for a peace conference. The eyes of the State were set towards Montgomery, and, with adjoining States, already in session, it had chosen delegates to form a Southern Confederacy.<sup>2</sup> The Americans are fond of conventions. They have long been a favorite agency in politics, trade and religion. No other people have held so many. It may be said that in America no day is without its convention. We do not take them all seriously though we often go to great labor and expense to attend them.

Twenty-one States responded to the Virginia call. The absent ones were the seven that had seceded, and Michigan, Wisconsin, Minnesota, California and Oregon. Maine and Iowa were represented by their members in Congress; from twelve States the delegates came by legislative appointments<sup>3</sup>; from seven<sup>4</sup>, by executive. No more respectable body of citizens has gathered to discuss public questions in America, and propose a remedy for "unhappy controversies" than the one hundred and thirty-three men who assembled in Willard's Hall, Washington, on the first Monday of February, 1861. Among them were William Pitt Fessenden and Lot M. Morrill, of

<sup>1</sup> For the Message, see Richardson, V, 661.

<sup>2</sup> See pp. 561-611 and Journal of S. C. Convention of 1860, pp. 150-158. (January 1-3, 1861.)

<sup>3</sup> Tenn., Indiana, Ohio, Ky., Del., Ill., N. J., N. Y., Pa., Mass., R. I., Mo.,—Crittenden's Debates and Proceedings of the Peace Convention of 1861, p. 453.

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Maine; George S. Boutwell, of Massachusetts; David Dudley Field, Erastus Corning and William E. Dodge, of New York; Frederick T. Frelinghuysen, of New Jersey; David Wilmot, of Pennsylvania; Reverdy Johnson, of Maryland; John Tyler and George W. Summers, of Virginia; Thomas Ruffin, of North Carolina; James Guthrie, of Kentucky; Salmon P. Chase and Thomas Ewing, of Ohio; Caleb B. Smith, of Indiana; Stephen T. Logan and John M. Palmer, of Illinois; James Harlan, of Iowa, and other distinguished civilians.

The resolutions, under which most of these held their appointments, are highly instructive as showing the attitude of the State legislatures toward the issues of the time.<sup>1</sup> Tennessee proposed a constitutional amendment, almost identical with that submitted by Douglas to the committee of thirteen, but with no reference to free persons of color. The slaveholding States having agreed among themselves on a basis of adjustment, should invite the other States to meet in a Constitutional Convention, at Richmond, some time in February, 1861.

The Ohio legislature, which had recently elected Chase to the Senate, was "fully satisfied with the Constitution as it is, if fairly interpreted and obeyed by all sections of the country." Kentucky proposed the Crittenden resolutions. Indiana instructed its commissioners to take no action until nineteen States were represented, and, like Ohio, affirmed that the Constitution "contains ample provisions within itself for the correction of the evils complained of." Delaware declared that preservation of the Union to be paramount to any political consideration. Its appointment of commissioners, Illinois wished to be understood not as an expression on the part of the State that any amendment of the Federal Constitu-

<sup>1</sup> For the resolutions, see *Id.*, pp. 454-464.

tion was requisite "to secure to the people of the slaveholding States adequate guarantees for the security of their rights," nor as an approval of the basis proposed by Virginia.

The resolutions of New Jersey were a departure in the history of that State, and the announcement of a doctrine of which much was to be said and heard during the next twenty-five years. "The Government of the United States is a National government, and the Union it was designed to perfect is not a mere compact or league." It recommended the Crittenden resolutions, and if these were not adopted, that Congress call a Constitutional Convention. The States should repeal all acts interfering with the fugitive slave laws. New York sent commissioners to the conference as a possible means "of an honorable settlement of our national difficulties," but wished not to be understood as approving of the propositions submitted by Virginia.

The Pennsylvania legislature denied that there was reasonable cause for extraordinary excitement. It believed no constitutional amendment necessary, but the State would support one making the fugitive slave clause more effective. Massachusetts, Rhode Island and Missouri made no comments, but sent delegates in the hope of peace.

The conference was in session nineteen days and Ex-President Tyler presided. It was the plan of Virginia that the Conference should work out a constitutional amendment and send it to Congress, which body should submit it to the States for ratification. The Conference voted by States. Guthrie, of Kentucky, was made chairman of the General Committee on Propositions, and on the fifteenth it reported an amendment, the basis of which was the Missouri Compromise line. New ter-

ritory could be acquired only with consent of four-fifths of all members of the Senate, which would amount practically to a prohibitory clause. Virginia had proposed the Crittenden resolutions<sup>1</sup>, which put no obstacles in the way of acquiring territory. It seemed that its wishes would be those of the Conference, for on the last day the Missouri Compromise line, as described in the Crittenden resolutions, was adopted by the votes of nine States to eight, Virginia voting in the negative. Virginia insisted on the admission of States south of the line, with slavery, and north of it, with or without slavery as the population might decide in its constitution. Free persons of color were to be excluded from all political rights throughout the Union. The vote on the line of 36° 30', on the twenty-seventh, was directly contrary to the vote on the same issue the day before, when the line was rejected by eleven States to eight.<sup>2</sup> Just why the Conference changed its mind so suddenly has never been explained. Perhaps the best explanation is suggested by the debates themselves, and the numerous resolutions, giving voice to irreconcilable opinion. But the Conference passed a thirteenth amendment which Tyler sent to the Senate on the twenty-seventh of February. It was referred to a committee of five,<sup>3</sup> of which Crittenden was chairman, and he espoused it with what energy and hope he could, after his own resolutions had been rejected by the Conference. But to so generous a mind as Crittenden, no price, with honor, was too great for Union, and he labored to have the Conference resolutions substituted for his own. At times till the second of March he spoke, but the Senate, on that day, by a vote of twenty-

<sup>1</sup> Peace Convention Debates, 418-420.

<sup>2</sup> Debates, 438.

<sup>3</sup> Senate Journal, 333; Globe, 1254.

eight to seven, rejected the amendment.<sup>1</sup> The vote clearly measured the estimate which the Senate put on the work of the Conference. There was yet another hope of compromise, for on the day when the Senate committee of five was appointed to report on the Conference resolutions, John W. Forney presented a message to the Senate from the House, that it desired the concurrence of the Senate in a joint resolution, which it had passed, to amend the Constitution.<sup>2</sup>

This amendment may be said to have engaged the attention of the House almost from the opening of the session. We have seen what efforts were put forth in some of the slave States to break up the Union; what ideas prevailed in some of the free States as to the means of saving it; what compromise was suggested by Virginia, leading to the interesting but useless peace conference, and what antagonisms made the efforts of the Committee of Thirteen futile. Amidst all this gloom there have rung out the clear voices of Wade and Trumbull, and Seward, and their colleagues and followers, but not yet were they clothed with power to act. While the strength of the Union has been sapped by secession and very distinguished public men have one after another risen in Congress to announce the termination of their allegiance to the old flag, and their devotion, henceforth, to a Confederacy of slaveholding States, the House of Representatives, under control of men of that party which had elected Lincoln, have been attempting the solution of the great problem, whether the Union should longer endure. Looking back to the period in which all these things were done, we miss the quality of mercy which a later generation has been prone to read into the ac-

<sup>1</sup> Journal, 386.

<sup>2</sup> Journal, 339.



tion of that day. Thus far no sign of pity for the slave, nor of justice to the free black has appeared. States, Congresses, conventions, Presidents and Courts of Law, the powers of the Republic, have dealt with the millions of the African race in bondage, and the half million in precarious freedom, as commodities in the market, as property increasing in value or declining, with the acts of legislatures and the decrees of courts. Thus far every plan for saving the Union has had for its chief purpose the more complete subjugation, the more hopeless bondage and inferiority of the unfortunate race. Even the aggressive friends of Union have demanded little more than the *statu quo*. Wade would not hint at making slavery in a State insecure, nor at this time at the price of peace would Seward refuse to have it established there, beyond the reach of Congress forever.<sup>1</sup> It was the new States that should be free; it was the Territories from which the institution should be excluded. No one has hinted at the abolition of slavery as the price of Union. Thus far, every plan has proposed the permanency of slavery. The Republic should be made a slaveholding Republic forever.

It is with great interest, therefore, that we turn to the Republican House, to learn what amendment it will propose as the saving compromise of 1861.

As soon as the President's message was read, on the fourth of December, several motions were made to refer it to a special committee. McClernand of Illinois moved for a committee with duties like those which the Senate had given to the Committee of Thirteen, but by a vote of one hundred and forty-five to thirty-eight the House

<sup>1</sup> See his resolution to this effect proposed to the Committee of Thirteen (Report Com., No. 288. Senate, 36th Congress, 2d Session, p. 11).

adopted the motion of Boteler, of Virginia, to raise a Committee of Thirty-three, one member from each State, "with leave to report at any time." Boteler, who belonged, as he said, to "the Southern opposition party," made his motion "to afford those upon the other side of the House an opportunity to state to us and to the country whether they meant to tender to us the olive branch of peace or the sword."<sup>1</sup> The nays to Boteler's motion came from Republicans who were radical opponents of slavery, and among them were the strong Ohio leaders, Ashley, Bingham and Sherman; Burlingame, of Massachusetts; Grow, Hickman and Thaddeus Stevens, of Pennsylvania, and Owen Lovejoy and Elihu B. Washburne, of Illinois. But the Republicans were not an abolition party. They stood for the limitation, not the extinction of slavery, yet, as time proved, limitation meant extinction, and the fate of the new party was bound up with that of slavery.

No sooner was the Committee of Thirty-three agreed upon than the Representatives, like their colleagues in the other Chamber, began an open confession of their opinions, and first the Southern members: "I was not sent here for the purpose of making any compromise or to patch up existing difficulties," said Singleton of Mississippi; "I decline voting on the pending proposition for the reason that the Legislature of the State has called a convention to take into consideration the subject matter not before this House. I leave to the sovereign State of Mississippi to determine for herself her present Federal relations." For the same reasons Jones, of Georgia, declined to vote. "The people of Florida," said Hawkins, "have resolved to determine in convention, in their sovereign capacity, the time, place and manner of

<sup>1</sup> Globe, December 4, 1860, p. 6; January 10, 1861, p. 316.

redress. It is not for me to take any action on the subject. The day of compromise has passed," but he was stopped at calls of "Order" from all parts of the House. "Believing that a State has a right to secede," said Clopton, of Alabama, "and that the only remedy for present evils is secession, I will not hold out any delusive hope or sanction any temporizing policy." Moreover, Alabama, like her sister States, was to settle the matter in convention. "The South Carolina delegation," said Miles, "have not voted on this question because they conceive they have no interest in it. We consider our State as already withdrawn from the Confederacy in everything except form." This was thirteen days before the South Carolina convention met, but the equitably minded Miles considered that done which he thought ought to be done. "As my State of Alabama intends following South Carolina out of the Union by the tenth of January next, I pay no attention to any action taken in this body," said Pugh, and his name stands first among the signers to the address of "certain Southern members of Congress" to their constituents, issued ten days later, and was followed by the names of Clopton, Jones, Hawkins, Singleton and Miles.<sup>1</sup> William Pennington, of New Jersey, the Speaker, was a Republican of moderate anti-slavery opinions. He named the committee on the sixth, with Thomas Corwin, of Ohio, Chairman. All its members were representative men, so that the Committee of Thirty-three, like that of thirteen, contained men of all parties, as they were in the autumn of 1860, and of both parties, as they were becoming by the pressure of events. Some of the committee were destined to yet greater prominence in public life, and of these were Charles Francis Adams, of

<sup>1</sup> *Globe*, December 4, 1860, p. 7; the address has already been given in full, in this chapter, p. 616.

Massachusetts, soon to be appointed by Lincoln minister plenipotentiary and envoy extraordinary to England, and there to perform a service for his country that ranks him with Franklin among American diplomatists; Orris S. Ferry, of Cincinnati, recently elected to Congress, but destined to an honorable career in both Houses; Justin S. Morrill, of Vermont, whose public life, beginning in 1855, was to continue longer than that of any of his colleagues, and in its years of legislative experience in both Houses to outnumber those of any other American; William Windom, of Minnesota, destined to serve as Secretary of the Treasury under two Presidents, and Henry Winter Davis, of Maryland, intense, fervid in patriotism and brilliant in debate. The radical, Southern members were soon to leave Congress and enter upon the disastrous secession movement. Warren Winslow was to vote for the ordinance of secession of his State, as a member of the North Carolina convention of May, 1861. But no member of the committee surpassed its chairman, Thomas Corwin, in public experience, political sagacity, legal acumen and honorable fame. His public life extended back to the days of the Missouri Compromise. He had served as Governor of Ohio, and had served five years in the Senate when President Fillmore, in 1850, called him into his cabinet as Secretary of the Treasury. He, too, with Charles Francis Adams, was soon to enter the diplomatic service, and his career as minister to Mexico during the troublous years of civil war sustained a reputation which remains to this day quite unequalled for eloquence, wit and political leadership.<sup>1</sup>

<sup>1</sup> The Committee consisted of Thomas Corwin, of Ohio, Chairman; John S. Millson, Va.; Charles F. Adams, Mass.; Warren Winslow, N. C.; James Humphrey, N. Y.; William W. Boyce,

Though some of the Southern members of the committee were radical pro-slavery men, none of the Northern members were abolitionists. Morrill may be said to have held opinions more closely approaching abolitionism than did any other of the thirty-three. But he came from the State which had fewest negroes, and in that respect, he illustrated Douglas's favorite saying that the most radical anti-slavery men came from regions where a black man was rarely seen, and the most extreme agitators for a more stringent fugitive slave law from the parts of the South from which no slave ever escaped.

Hawkins, as soon as the names of the committee were announced, asked to be excused. "The time for compromise has passed," said he, and he declared that his action was the result of more than twenty years' consideration. But the matter went over till the tenth, when he gave his reasons for being excused. Florida was to meet in convention on the third of January, "then to act in her sovereign capacity, a peer of thirty-two other sovereignties." Though her population had been retarded by untoward circumstances, she was none the less sovereign; "entitled to the same political consideration as France, and Portugal, the same as Russia, and in this Confed-

S. C.; James H. Campbell, Pa.; Peter E. Love, Ga.; Orris S. Ferry, Conn.; Henry Winter Davis, Md.; Christopher Robinson, R. I.; William G. Whitely, Del.; Mason W. Tappan, N. H.; John L. N. Stratton, N. J.; Francis M. Bristo, Ky.; Justin S. Morrill, Vt.; Thomas A. R. Nelson, Tenn.; William McKee Dunn, Ind.; Miles Taylor, La.; Reuben Davis, Miss.; William Kellogg, Ill.; George S. Houston, Ala.; Freeman H. Morse, Maine; John S. Phelps, Missouri; Albert Rust, Ark.; William A. Howard, Mich.; George S. Hawkins, Fla.; Andrew J. Hamilton, Texas; Cadwalader C. Washburne, Wis.; Samuel R. Curtis, Ia.; John C. Busch, Cal.; William Windom, Minn.

Globe, December 6, 1860, p. 22.

eracy of States, the peer and equal of New York." She was going to settle for herself the time, the mode and manner of redress, and this would include the action of this very committee. In America, the State was the principal; the Representative, the agent. "I tell the North that Mississippi, Alabama, Florida, Georgia and South Carolina are certain to secede from this Union within a short period; Arkansas, Louisiana and Texas are certain to follow within six months." Hawkins, like Iverson, saw an obstacle in Governor Houston, but unlike Iverson, he did not suggest assassination to remove him. He only hampered Texas. But, said Hawkins, "Texas may be compelled to commence her action with revolution at home."

This precipitated a scathing and rather personal review of the committee, but it also brought out some sectional opinions. "There is not upon your committee," said Clement L. Vallandigham, of Ohio, "one solitary Representative east of the Rocky Mountains, of that mighty host, numbering one million six hundred thousand men, which for so many years has stood as a vast breakwater against the winds and waves of sectionalism, and upon whose constituent elements, at least, this country must still so much depend in the great events which are thronging thick upon us, for all hope of preservation now or restoration hereafter. I speak now as a Western man, and I thank the gentleman from Florida heartily for the kindly sentiments towards that great West, to which he has given utterance. Most cordially I reciprocate them, one and all. We of the Northwest have a deeper interest in the preservation of this Government in its present form than any other section of the Union. Hemmed in, isolated, cut off from the seaboard upon every side, a thousand miles and more from

the mouth of the Mississippi, the free navigation of which, under the law of nations, we demand, and will have at every cost; with nothing else but our other great inland seas, the lakes, and their outlet too, through a foreign country; what is to be our destiny? We have fifteen hundred miles of southern frontier, and but a little narrow strip of eighty miles or less from Virginia to Lake Erie, bounding us upon the east. Ohio is the isthmus that connects the South with the British possessions, and the East with the West. The Rocky Mountains separate us from the Pacific. Where is to be our outlet? What are we to do when you shall have broken up and destroyed this Government? We are seven States now, with fourteen Senators and fifty-one Representatives, and a population of nine millions. We have an empire equal in area to the third of all Europe, and we do not mean to be a dependency or province either of the East or of the South; nor yet an inferior or second-rate power upon this continent, and if we cannot secure a maritime boundary upon other terms we will cleave our way to the seacoast with the sword. A nation of warriors we may be, a tribe of shepherds, never.”<sup>1</sup> And Vallandigham complained that this imperial domain was not represented on the committee. But the pith of his thought was the fate and probable action of the West. Had the Mississippi River emptied into Delaware Bay doubtless Vallandigham, for the reasons he now gave, would have said to the secessionists, “May not a people do what it will with its own?” And the shepherds of the West might not have turned into a nation of warriors in the South.

“When the question of secession comes up in a practical form,” said John A. McClernand, of Illinois, “I

<sup>1</sup> *Globe*, December 10, 1860, p. 38.

will be prepared to take my position upon it, in the view of the House and of the nation, and having taken it, will endeavor to maintain it to the utmost of my limited influence, and by all the legitimate means in my power;" words singularly prophetic of his own career when the question came. "Until then I will forbear to enter into it, preferring rather to obey the dictate of the scriptural proverb which dictates that 'sufficient unto the day is the evil thereof.' I will only say now that no more fearful question could engage the attention of this body. It discloses to my vision a boundless sea of horrors. Peaceable secession, in my judgment, is a fatal, a deadly delusion.<sup>1</sup> The Government, in itself may be weak, comparatively weak, but is strong in the moral sentiment and patriotic feeling of the country. In this respect, it is or at least ought to be, the strongest government in the world. Bound together as one people, by a common language, a common religion, common rivers, mountains and lakes, civil war alone, in my opinion, can sunder us into broken fragments,—a tremendous civil war, such a war as would choke our rivers with carnage, and discolor our inland seas with human blood; such a war as never before fattened the earth with human slaughter. It would not be a war in which Greek met Greek, but Anglo-Saxon, Anglo-Saxon; father, son; and brother, brother. If I am asked, why so? I retort the question, How can it be otherwise? How are the questions of public debt, public archives, public funds, and other public property, and above all, the question of boundary to be settled? Will it be replied, that while we are mutually unwilling now to yield anything, we will be mutually willing, after a while, to concede everything? To concede everything by and for the sake of national duality? Who believes this? What, too,

<sup>1</sup> Globe, December 10, 1860, p. 39.



would be the fate of the youthful but giant Northwest, in the event of a separation of the slaveholding from the non-slaveholding States? Cut off from the main Mississippi and the Gulf of Mexico on one hand, or from the eastern Atlantic ports, on the other, she would gradually sink into a pastoral state, and to a standard of national inferiority. This, the hardy and adventurous millions of the Northwest would be unwilling to consent to. This they would not do. Rather would they, to the last man, perish upon the battlefield. No power on earth could restrain them from freely and unconditionally communicating with the Gulf and the great mart of New York." Speaking then of the Southern States he continued: "If they are wronged, let them seek redress in the Union; first by all lawful methods, and next, if necessary, by other means, but still as members of the Confederacy. Abandoning us, however, to our fate, what must be our revulsion of feeling towards the South? I will not undertake to say, only so far as to predict that it would consolidate the two sections, severally, against each other in fierce and unrelenting strife." But McClelland put the responsibility of civil war upon the Republican party, because of "their persistent and dogmatical adherence to their anti-slavery proviso, and to their opposition to the principles or details of the fugitive slave law." The Speaker had ignored the Douglas Democrats, was his complaint, had "proscribed them," as he said, "by excluding a million and a half of Northern Democrats from any representation on the committee."<sup>1</sup>

"I look upon secession," said Daniel E. Sickles, of New York, "as the last dread alternative of a free State when it has to choose between liberty and injustice. In our federal system the recognized right of secession is a con-

<sup>1</sup> Id.

servative safeguard. It is the highest constitutional and moral guarantee against injustice, and, therefore, if it had been always and universally acknowledged as a rightful remedy, it would have contributed more than all else to perpetuate the Union, by compelling the observance of all their obligations on the part of all the States. The opposite dogma, which is so extensively believed at the North, that no matter what wrongs a State may have to endure, it may and ought to be compelled by force to remain in the Union, even as a conquered dependency, is a most dangerous error in our system of government, and has contributed largely to the existing anarchy." He put the responsibility with the Republican party. It was an illusion that the responsibility rested with the South. If the Speaker had committed a fault it was in not putting more ultra-Republicans among the Thirty-three. Let the President-elect speak a few words of conciliation. If he "would cause it to be made known to all the applicants for office under his administration, that he will not entertain the application of any man who is in favor of the so-called personal liberty bills, or opposed to the faithful execution of the fugitive slave-law, if he will do that, plainly and in good faith, through his representative men, you will not hear the word 'slavery' for the next four years from the Republican party North, East or West." But this verbal remedy for the wrongs of the South was not the end of events. Secession might not prove merely a Southern question.

"The city of New York," he continued, "will cling to this Union while there is a hope left for its preservation, and she will hold all men to a just accountability for whatever woe shall betide the Confederacy; but when there is no longer a Union, proud as she is, and has been always, of her position as its metropolis, ready to bury everything

like sectional prejudice, ready always to contribute in all things to maintain its honor and preserve its integrity at home and abroad; yet when this Union is no more, she will never consent to remain an appendage and a slave of a Puritan province. She will assert her own independence. The North will then see and feel that secession, although it may begin at the South, will not end at the South. There is no sympathy now between the city and the State of New York, not the least, nor has there been for years. The city of New York is now a subjugated dependency of a fanatical and puritanical State government, that never thinks of the city except to send its tax-gatherers among us, or to impose upon us hateful officials, aliens to our interests and sympathies, to eat up the substance of the people by their legalized extortions. Between such communities there can be no sympathy, no feeling of fraternity, no loyalty in the city to the State; and nothing has prevented the city of New York from asserting the right to govern herself except that provision of the Federal Constitution which prohibits a State from being divided without its own consent. If we had not been thus restrained by the Constitution—and every word of it is sacred to us—we would long ago, in accordance with the desire of three-fourths of our people, have sought in independence the only escape from the oppression which has been put upon us. But the reverence of the people for constitutional obligations yet remained and they submitted year after year. When that restraint shall no longer exist, when the obligations of those constitutional provisions which forbid the division of a State without its own consent shall be suspended, then I tell you that imperial city shall throw off the odious government to which she now yields a reluctant allegiance; she will repel the hateful cabal at Albany, which has so long used its power

over her; and with her own flag, sustained by the courage and devotion of her own gallant sons, she will, as a free city, open wide her gates to the civilization and commerce of the world.”<sup>1</sup>

This equivocal speech did not tend to dishearten the secessionists. It intimated that secession was a thorough remedy for civil difficulties. It eliminated the old idea of “the general welfare” and intimated that the rich, the strong, the favorably situated parts of the Union might set up independent governments and “open wide their gates to the civilization and commerce of the world.” It did not examine whether such a course would advance civilization. Nor was its meaning lost on the secessionists. Commerce is always timid, and a nation of merchants would not long remain “free, sovereign and independent.” The attitude of New York city was carefully scanned by the Southern leaders while they were engaged in organizing a slaveholding Confederacy. Alabama owed “probably as much as eleven millions in the city of New York alone.” “The amount of indebtedness due from the South to the North amounts to several hundred millions of dollars,” said one of the members of the Alabama convention, and he advocated holding the share of Alabama in abeyance. “Then,” replied another member, “the merchant of New York city becomes, by the legal construction of this amendment, the enemy of Alabama, notwithstanding he has recognized our constitutional rights, braved the whole abolition pack of his State, and wasted time and money, and lost political caste at home in defense of our property.”<sup>2</sup>

Sickles, whose later career sufficiently demonstrated his love for the Union, did not grasp the intention of the seces-

<sup>1</sup> Id., pp. 40, 41.

<sup>2</sup> Smith's Debates, p. 176.

sionists of the South, however clear to him the cause of secessionists in New York city. His speech was not lacking, at the time, in aid and comfort to Hawkins of Florida, whom he did not wish to excuse from the committee, nor to Reuben Davis, who rejoiced that he himself belonged to it. It was one of the local speeches, left over from the stump, and delivered in Congress, of which the *Globe* and the *Record*, and even the old *Annals* contain numerous examples. Vallandigham, McClelland and Sickles were Northern Democrats familiar with the cry of "Wolf, wolf," from the South. Secession might be at hand: but these three agreed in one thing, that the Republicans were responsible for it. This means that secession was still considered by many in Congress merely as a political ruse—the alarm cry of the new party to close its ranks. The Democrats so ruthlessly overlooked by the Speaker in framing his committee had not yet parted company with the Democrats who under no consideration would serve on it. The committee, thought they, is a party device, not a serious agency for keeping the Union together. So Democrats of all shades of belief agreed in blaming the Republicans for what the resolution, raising the Committee of Thirty-three called "the perilous condition of the country." This aspect of affairs must be kept in mind while we are tracing step by step the growth of the thirteenth amendment of 1861.

Many of the Northern members of Congress, like their constituents, did not understand the South. For many years, and vehemently, for the last four, Senators and Representatives from the South had been talking secession. Northern Democrats and most of the Whigs believed it an idle threat. The new party thought it a form of madness and fanaticism, like radical abolitionism. But the Southern men never swerved from their purpose,

never retreated, never shrunk from the consequences of their theories and their actions. Many speeches and declarations might be cited as illustrations of the state of the Southern mind. "This question of morality does not necessarily arise here," said a member of the Alabama convention, in the debate of re-opening the African slave trade. "As a matter of opinion, I do not believe that the African slave-trade would be immoral in itself, now—or that it ever has been immoral. I hold, that the African, taken from his native wilds and placed in the ranks that march onward from savage to civilized life, is greatly benefited. He is humanized and Christianized. He rises from the condition of a brute into the position of a Christian man. The present condition of the Alabama negro illustrates this. Place a native African side by side with an Alabama negro—how vast is the difference in stature as well as in intellect. The one has the graceful and sinewy limbs of a Hercules, the other is a mere mongrel. In nine cases out of ten, in positive contentment, the Alabama slave is happier than his master. His cottage is built for him, his food provided, his meals prepared; his hearth is spread with substantial comforts, and his long nights are for those blissful dreams that are undisturbed by his knowledge of coming necessities. He has no cankering cares, no buffeting with fortune, no aspiration for expanding acres, no cares for rain or sunshine. He has neither cloth nor meat to buy; he is free from debt, he is above all civil law—and he looks forward to Christmas, not as the maturity time for his bills, but for his holidays. There can be nothing immoral in placing a savage in such a condition as this."<sup>1</sup>

"The world should know," said another member, "that the Southern people are agreed upon the moral question—

<sup>1</sup> Smith's Debates, 201.

that we regard this institution among us a positive good—a blessing both to the white and the black races—that our consciences are clear, and that we, an undivided people, are prepared to maintain the truth. The declaration of it in solemn form, is demanded to meet successfully the errors on the subject, that prevail to an alarming extent in the Christian world. We have just dissolved the Union because a distinction was recognized between slave property and other kinds of property hostile to the former.”<sup>1</sup>

Nor was this opinion held only by the less prominent men of the South. It was the gospel of the Confederacy. “Not to be tedious in enumerating the numerous changes for the better,” said Alexander H. Stephens, in contrasting the Constitution of the Confederacy and that of the United States, “allow me to allude to one other—though last, not least. The new constitution has put at rest forever all the agitating questions relating to our peculiar institution, African slavery as it exists among us, the proper status of the negro in our form of civilization.” This was the immediate cause of the late rupture and present revolution. Jefferson, in his forecast, had anticipated this as the “rock upon which the old Union would split.” He was right. What was conjecture with him is now a realized fact. But whether he fully comprehended the great truth upon which that rock stood and stands, may be doubted. The prevailing ideas entertained by him and most of the leading statesmen at the time of the formation of the old Constitution were that the enslavement of the African was in violation of the laws of nature; that it was wrong in principle, socially, morally, and politically. It was an evil they knew not well how to deal with; but the general opinion of the men of that day was that, somehow or other, in the order of Providence, the institu-

<sup>1</sup> Smith's Debates, 253.

tion would be evanescent and pass away. This idea, though not incorporated in the Constitution, was the prevailing idea at the time. The Constitution, it is true, secured every essential guarantee to the institution while it should last, and hence no argument can be justly urged against the constitutional guarantees thus secured, because of the common sentiment of the day. Those ideas, however, were fundamentally wrong. They rested upon the assumption of the equality of races. This was an error. It was a sandy foundation, and the government built upon it fell when "the storm came and the wind blew." Our new government is founded upon exactly the opposite idea; its foundations are laid, its corner-stone rests upon the great truth that the negro is not equal to the white man, that slavery, subordination to the superior race is his natural and normal condition.

"This, our new government, is the first in the history of the world based upon this great physical, philosophical, and moral truth. This truth has been slow in the process of its development, like all other truths in the various departments of science. It has been so even amongst us. Many who hear me, perhaps, can recollect well that this truth was not generally admitted, even within their day. The errors of the past generation still clung to many as late as twenty years ago. Those at the North who still cling to these errors, with a zeal above knowledge, we justly denominate fanatics. All fanaticism springs from an aberration of the mind, from a defect in reasoning. It is a species of insanity. One of the most striking characteristics of insanity, in many instances, is forming correct conclusions from fancied or erroneous premises. So with the anti-slavery fanatics; their conclusions are right, if their premises are. They assume that the negro is equal, and hence conclude that he is entitled to equal rights



and privileges with the white man. They were attempting to make things equal which the Creator had made unequal. I cannot permit myself to doubt the ultimate success of a full recognition of this principle throughout the civilized and enlightened world."<sup>1</sup>

Nor was this the limit of slavocratic opinions, plans and purposes. Calhoun had hinted at a slaveholding republic extending indefinitely southward over the islands of the sea and beyond the forests of Bolivia. This was in 1844, when, as Secretary of State, he resented any action of Great Britain to prevent the annexation of Texas and its absorption into a slaveholding country.<sup>2</sup> That dream of a slaveholding empire had ever since flitted over the Southern mind. Fifteen years of brooding on the prize had almost clothed it with reality. The theme was a favorite one with Southern orators whose words might not be seized as the outline of a policy.

"It is true," said a member of the Alabama convention, "that the interests of the South may demand territorial expansion, for expansion seems to be the law and destiny and necessity of our institutions. To remain healthful and prosperous within, and to make sure our development and power, it seems essential that we should grow without. Arizona and Mexico, Central America and Cuba, all may yet be embraced within the limits of our Southern republic. A Gulf Confederacy may be established in the South, which may well enjoy almost a monopoly in the production of cotton, rice, sugar, coffee, tobacco and tropical fruits. The trade of all tropical America, combined with that of the Cotton States, would make our Confederacy the wealthiest, the most progressive and the most influential power on the globe. Should

<sup>1</sup> Johnston's *American Orations*, III, 169.

<sup>2</sup> Letter to King, *Works*, Vol. V, 379-392.

the border States refuse to unite their destiny with ours, then we may be compelled to look for territorial strength and for political power to those rich and beautiful lands that lie upon our southwestern frontier. Their genial climate and productive soil; their rich agricultural and mineral resources, render them admirably adapted to the institution of slavery. Under the influence of that institution, these tropical lands would soon add millions to the commercial wealth of our Republic, and their magnificent ports would soon be filled with ships from every nation. Slave labor would there build up for the Southern Confederacy populous and wealthy States, as it has built up for the late Union the States of Georgia, Alabama, Mississippi, Louisiana and Texas.”<sup>1</sup>

This dream was not a passing fancy in Alabama, only; it was hidden in the address which South Carolina issued to the people of the slaveholding States, treating of slavery, territorial expansion, power, wealth. Because Northern men did not believe these things, they denied belief in them to the South. The more clearly and earnestly Southern members set forth these opinions, the North merely said: “Another fugitive slave law will quiet them.” When Iverson and Davis and Brown and Hawkins and others declared from their places in Congress that the South wanted no more compromises, that nothing the North could do would satisfy the Southern demand, Congress responded with the committees of thirteen and thirty-three. And no voice was heard on behalf of the millions whom the Creator had made the subordinate race. Save the Union, and spare not the bondman; the Union is a sacred compact; the African is property. It is not strange that some men and women exclaimed: save the African and let the Union go. But these were radical

<sup>1</sup> Smith's Debates, 236-237.

abolitionists, abhorred by the Democratic party North and South, and almost equally abhorred by the party which had elected Lincoln and Hamlin. Yet Phillips and Garrison and their associates were slowly giving name and character to the North. Lincoln was not an abolitionist, in 1860, neither was Seward, nor Chase, nor Stanton, nor Thurlow Weed, nor Horace Greeley, nor was the Republican party an abolition party at that time. It demanded the limitation of slavery: no more slave Territories. It did not say, "No more slave States," though it denied the right and power of Congress to make slavery legal anywhere. In this it was opposed to the Southern wing of the Democratic party which declared that Congress had no right or power to limit slavery whether in territories or States.

But slavery limitation meant abolition, to the South, whence the tone of thought and speech on the subject in all the secession conventions fully expressed in the declarations of causes for secession sent out by South Carolina and Mississippi.<sup>1</sup> It is difficult, usually impossible, to see things that are too near the eye. The mighty secession movement of 1860 was unseen by many Northern members of Congress and was scarcely known to the mass of the people in the free States.

On the eleventh of December, Hawkins' service on the committee was again discussed. "I can but regard this committee as a tub thrown out to the whale to amuse only until the fourth of March next; and thus arrest the present noble and manly movement of the Southern States to provide by that day for their security and safety out of the Union," said Reuben Davis, of Mississippi; "with these views, I take my place on the committee, for the purpose of preventing it being made a means of decep-

<sup>1</sup> See pp. 561-570.

tion, by which the public mind is to be misled and misguided; yet intending honestly and patriotically to entertain any fair proposition for adjustment of pending evils which the Republican members may submit.”<sup>1</sup> Cobb, of Alabama, gave notice of the approaching convention at Montgomery and said, “If anything is to be done to save my State, it must be done quickly.”<sup>2</sup> By a vote of one hundred and one to ninety-five, the House refused to excuse Hawkins, and by a vote of one hundred to one hundred, refused to excuse Boyce, of Virginia; but neither of these attended its sessions. As the Southern States seceded one after another, their delegations in the House announced the fact and most of the members withdrew. Thus before the committee was ready to report, all the Southern members, except Andrew J. Hamilton, of Texas,<sup>3</sup> had withdrawn, and the committee had become a forlorn hope.

But the committee earnestly and faithfully entered upon its heavy labors. It had two services to render: to report necessary legislation and a constitutional amendment. This double duty it sought to perform in its almost daily sessions from the twelfth of December to the fourteenth of January. The leading members of all parties in the House, abounded in resolutions and amendments and these were duly read and referred to the committee.<sup>4</sup> They did not differ in substance from propositions, to the same end, submitted in the Senate, of which an account has been given. But they greatly exceeded the Senate propositions in number and in the variety and combination of

<sup>1</sup> *Globe*, December 11, 1860, p. 59.

<sup>2</sup> *Id.*

<sup>3</sup> Appointed military governor of Texas, by President Lincoln, in 1862.

<sup>4</sup> See twenty-three of these resolutions in the *Globe* for December 12 and 17, 1860, pp. 76, 77, 78, 79, 96.

their remedial elements. The legislation demanded by most members was thought by them of sufficient importance to be given permanent form in a constitutional amendment. It would be futile therefore to attempt to classify the propositions as legislative and constitutional, or even to group the propositions as a whole. The committee was large and its own members submitted many resolutions. The Constitution should be amended by the addition of the Crittenden resolution;<sup>1</sup> the Federal Government should protect slaves like other property; it should admit new States with or without slavery, as their people might decide; it should reimburse slave-owners for escaping slaves; it should exclude from the right to vote, in every State, all persons not of pure, unmixed blood, of the Caucasian race, and should not legislate on slavery in any territory.<sup>2</sup> The States should revise their statutes and repeal all conflicting with federal laws.<sup>3</sup> Morrill, of Vermont, on the thirteenth, in committee, offered the pacific resolution that "any reasonable, proper and constitutional remedy necessary to preserve the peace of the country and the perpetuation of the Union should be promptly and cheerfully granted," but this was promptly voted down by twenty-two to nine.<sup>4</sup> By twenty-two to eight the committee adopted the resolution of Dunn, of Indiana, slightly modifying that by Rust, of Arkansas, that "additional and more specific guarantees" of the peculiar rights of the South "should be promptly and cheerfully granted."<sup>5</sup> New Mexico should be admitted,

<sup>1</sup> Report No. 31, H. R., 36th Congress, 2d Session. Journal of the Committee. The Crittenden Resolutions proposed by Nelson of Tenn.

<sup>2</sup> Id., p. 4, proposed by Whitely of Delaware.

<sup>3</sup> Id., p. 5, proposed by Henry Winter Davis of Maryland.

<sup>4</sup> Id., p. 7.

<sup>5</sup> Id., p. 8.

with whatever constitution its people might adopt, and Arizona should be included within its boundaries; Kansas should be admitted with the Leavenworth constitution, but no additional territory should be acquired by the United States without the consent of two-thirds of the States in the Senate, and of two-thirds of all the members of the House.<sup>1</sup>

But Rust's proposition to restore the Missouri Compromise line, prohibiting slavery north of it and leaving slavery south of it to be decided by new States, was rejected by sixteen to thirteen.<sup>2</sup> By a vote of twenty-one to three Charles Francis Adams's resolution was adopted, that a constitutional amendment should be added that should forbid interference with slavery unless an amendment to that end should originate with a slaveholding State and receive the assent of every State in the Union.<sup>3</sup> On the twenty-ninth of December, Taylor, of Louisiana, announced his intention to deliberate with the committee no longer, as it offered, to his mind, no hope of agreement; and from this time the absence of the Southern members made its work merely perfunctory. But it continued to entertain resolutions. On the second, without a division, Corwin's amendment was agreed to, that it was highly inexpedient and improper for Congress to abolish slavery, or to make the attempt, in places within slaveholding States over which the Government held jurisdiction.

That party politics ruled in the committee was shown, on the eleventh, when Adams moved to adopt the resolution, that peaceful acquiescence in the election of a Chief-Magistrate, accomplished in accordance with every

<sup>1</sup> Id., p. 14, proposed by Davis of Maryland.

<sup>2</sup> Id., pp. 15-16.

<sup>3</sup> Id., p. 17.

legal and constitutional requirement, is the paramount duty of every good citizen of the United States. Millson, of Virginia objected, and moved to strike out the words, "the paramount" and insert "a high and imperative," which was agreed to, by eleven to ten. Seven of the Southern members had it entered on the journal that they refused to vote on the amendment, or on Adams's resolution, because it did not contemplate any legal enactment by Congress, or an amendment to the Constitution. Millson, Nelson and Bristow entered another minute, explaining their vote for Millson's amendment, because they did not want it to appear that "the grievances assigned by the seceding States to justify their ordinances of secession, were only pretexts to cover a resistance to the late election of Chief-Magistrate."<sup>1</sup> A Thirteenth Amendment was then agreed to by twenty to five; a proposition to admit New Mexico (including Arizona) by fourteen to nine, and a more effective fugitive slave law, by twelve to eleven.<sup>2</sup>

The constitutional amendment was as follows: "No amendment of this Constitution having for its object any interference within the States with the relation between their citizens and those described in section second of the first article of the Constitution as 'all other persons,' shall originate with any State that does not recognize that relation within its own limits, or shall be valid without the assent of every one of the States composing the Union."<sup>3</sup> This was agreed to by the committee on the eleventh of January.

While the committee had been thus engaged, the House had referred many resolutions and amendments to it.

<sup>1</sup> Id., p. 35.

<sup>2</sup> Id., pp. 35, 36.

<sup>3</sup> Id., p. 35.

These were not acted on by the committee. They show, however, the state of public feeling, as they came up from all parts of the Union. They began on the twelfth of December, when twenty-two members submitted resolutions, under a call of the States for the purpose, and Anderson, of Missouri, submitted another set, on the following day. They proved, at the outset, how hopeless it was to expect unanimity. The most that could be looked for was the adoption of a party measure, and this could not be accepted by the States as a constitutional amendment.

Congress, like the world, has its characters and its list of curious propositions which, if their originators are to be believed, would benefit the country if enacted into laws. Andrew Johnson's plan of pacification, offered in the Senate, by which Presidents and Vice-Presidents should be taken alternately from slave States and free States, but never both from either, has been mentioned. The House now gave illustration of three even stranger schemes for healing all discords. Albert G. Jenkins, of Virginia, proposed a dual executive; the division of the Senate into two bodies; the consent of a majority of Senators from both the free and the slaveholding States necessary to all action by the Senate; and the creation of another advisory body, to be called a council. All these, he thought, would simplify legislation and give better expression to the public will. John W. Noell, of Missouri, doubtful of the wisdom of the fathers, wanted the committee of thirty-three to recommend the abolition of the offices of President and Vice-President, and to establish, instead, an executive council, consisting of three members, elected by districts of contiguous States, as near as practicable, each armed with the veto power. The equilibrium between free and slaveholding States should be restored and maintained



by the voluntary division of some of the slave States, into two or more. These visionary measures were suggested on the twelfth of December. A third, even more fantastical, came from Vallandigham, on the seventh of February, after a dozen ordinary propositions had followed the list already mentioned. The Union should be divided into four great sections, the North, the West, the Pacific and the South. On demand of one-third of the Senators of any section, on any measure to which the concurrence of the House was necessary, except on a question of adjournment, a vote should be had by sections, and a majority of the Senators from each section voting should be necessary to the passage of the measure. Each State should have two electors at large; but the others should be chosen by districts. A majority of all the electors in all the four sections should be necessary to the choice of President and Vice-President, and a majority of the States in each when the election should go to the House. The term of the President and Vice-President should be six years, and they should not be re-eligible, except by votes of two-thirds of all the electors of each section. Congress should by law provide for an election of these officials in a failure of the House and the Senate to choose a President and a Vice-President. No State should be allowed to secede without the consent of the legislatures of all the States of the section to which it belonged. In case of secession, Congress should arrange the terms. Neither Congress nor a Territorial legislature should have power to interfere with the right of the citizens of any State to migrate to another, with all rights of property secure. New States, not less than thirty thousand square miles in area, and having the Congressional ratio of population should be admitted from time to time under

whatever constitution they might adopt, provided it was republican in form.<sup>1</sup>

But the Committee of Thirty-three had meanwhile reported. The report, made on the fourteenth of January, was preceded by a political review of public affairs in late years. It lamented the publication of matter in the North "having a tendency to promote domestic insurrection in any of the States;" reviewed the excellencies of an ideal fugitive slave law; attributed the grievances of the South mainly to the abolitionists, a class that "did not act with any of the great political parties of the day," whose "chief leaders and most talented orators were most strenuously opposed to the Republican party in the late Presidential election;" quoted the plank in the Chicago platform, that the maintenance inviolate of the rights of the States, and especially, the right of each State to order and control its domestic institutions according to its own judgment exclusively, was essential to that balance of power on which the perfection and endurance of our political fabric depends, and denounced the lawless invasion by armed force of the soil of any State or Territory, no matter under what pretext, as among the gravest of crimes. The report then proceeded to explain and defend the resolutions, and the amendment which the committee recommended.

Guarantees of the rights, peculiar to the South, should be promptly and cheerfully granted. The peace of the Union was endangered by the personal liberty bills. These, the States enacting them should at once repeal. Slavery existed in fifteen States and there was no authority under the Constitution to interfere with it there: it was a local

<sup>1</sup> For Jenkin's resolutions, see the Congressional Globe for December 12, 1860, p. 77; for Noell's Id., p. 78; for Vallandigham's, February 7, 1861, p. 794.

institution. Therefore an effective fugitive slave law should be enacted. Conflicting elements in the government were not a sufficient cause for its dissolution. The faithful observance of all constitutional obligations by the States was essential to the peace of the country. The federal government should enforce the federal laws, protect federal property and preserve the Union. Lawless invasions, of States, or territories, should be prevented. The Constitution should be amended by the addition of another pro-slavery article.<sup>1</sup> New Mexico (including Arizona) should be admitted with or without slavery, as its people should decide by their constitution. A more severe and effective fugitive slave law should be passed, and a similar act for the rendition of fugitives from justice.

With Corwin's report were presented seven minority reports. The first declared that the Constitution needed to be obeyed rather than amended, and that it was sufficient for the preservation of the Union.<sup>2</sup> The second recommended the adoption of the Crittenden resolutions,<sup>3</sup> and also suggested a national constitutional convention. This last suggestion was also the burden of the third.<sup>4</sup> The fourth modified the Crittenden resolutions, made them more pro-slavery, and the fugitive slave law more severe.<sup>5</sup> Charles Francis Adams, in a fifth, recited and defended the resolution which had been submitted by him in committee, and so promptly rejected.<sup>6</sup> The sixth,

<sup>1</sup> Report of Committee of thirty-three, No. 31, H. R. cited, *supra*.

<sup>2</sup> Signed by Washburne and Tappan; *Id.*, pp. 1-11.

<sup>3</sup> Signed by Taylor; *Id.*, pp. 1-20; Phelps, Rust, Whitely and Winslow.

<sup>4</sup> Signed by Busch and Stout; *Id.*, pp. 1-3.

<sup>5</sup> Signed by Nelson; *Id.*, pp. 1-8.

<sup>6</sup> *Id.*, p. 3.

signed by Ferry,<sup>1</sup> dissented from the majority report because it contained matter to which Congress ought not to give its sanction. The seventh, objected because the report was deluding and misleading and did not have the support of those who framed its resolutions.<sup>2</sup>

So the committee was a house divided against itself. The minority reports were signed by fourteen members and half as many more from the Gulf States had absented themselves from the meetings. The report which Corwin made was therefore, in effect, a minority report also; so that the House resolutions, and various amendments more or less conflicting, had their counterpart in the reports of the committee appointed to bring the House to a harmonious settlement of all difficulties. Corwin had no faith in the report he had made. At heart he despaired of preserving the Union. "Treason," he wrote at this time, to the President-elect, "Treason is in the air around us everywhere. It goes by the name of patriotism. Men in Congress boldly avow it, and the public offices are full of acknowledged secessionists."<sup>3</sup> The report of the committee was made the order of the day for the twenty-first, to be continued from day to day till disposed of. But on that day it was not taken up. Soon after the House was in order, the Speaker, by unanimous consent, laid before it a communication from the Alabama delegation announcing the secession of the State from the Union, and their withdrawal from further deliberations of the House. It was not the first news of the kind. The South Carolina members had sent such a communication of the action of their State on the twenty-fourth of December. The Mississippi del-

<sup>1</sup> Id., p. 1.

<sup>2</sup> Signed by Love and Hamilton; Id., p. 2.

<sup>3</sup> Nicolay and Hay's Lincoln, III, 218.

legates had sent their notice on the twelfth of January. Now, Alabama had seceded. Cobb, a member from Alabama, remained till the thirteenth of January, when, having submitted the ordinance of secession of that State, and its invitation to the slaveholding States to assemble in Convention at Montgomery for the purpose of organizing a Southern Confederacy, he formally withdrew from the House. The Georgia members announced the secession of their State and withdrew on the twenty-third, and the Louisiana delegation on the fifth of February.<sup>1</sup>

Thus while the Committee of Thirty-three was working zealously to preserve the Union by concessions to the South, by guarantees of its "peculiar rights," the Gulf States were seceding from the Union with greater zeal and organizing a Confederacy of the slaveholding States. Of what use then conciliation, if the South would not have it? But even yet the Southern leaders were not taken seriously in the North. As soon as they discovered, which would be soon, that Lincoln was not an abolitionist and that they and their property and their peculiar rights were as safe under him as under Pierce or Buchanan, they would quiet down, and matters would go on much as they had for thirty years. Another compromise was wanted; that was all.

So the House continued to hear many propositions for adjusting affairs. The Crittenden resolutions came up again and again, and, it may be said, they ever had a backward look. If the Missouri Compromise had lasted thirty years, and then was wantonly repealed, or by a court dictum declared unconstitutional, and yet everybody knew that it kept the peace for thirty years, why not insert the principle of that compromise in the Constitution, where it would be safe from repeal, either by Con-

<sup>1</sup> See the Congressional Globes of these dates.

gress or the Supreme Court? But as delegation after delegation withdrew from Congress, secession began to be looked upon as a fact. Where would it end? There were discontented sections in the North; would they secede? Was America on the verge of anarchy? And so speech after speech was made, the greater number in the House, on the constitutionality of secession; on its consequences; some members defending it, others, speaking with the directness of Wade and Trumbull. But the new members, fresh from the campaign that had resulted in the election of Lincoln and Hamlin, were not given to silence in the House as their party associates were in the Senate. The Senate was Democratic and speech there need not be wasted. The House was Republican and from the members of the new party in the House, the coming administration and the people would soon be choosing men for high office. It was the party with the forward look and not as yet troubled by a long history.

Though many propositions looking to a constitutional amendment were made, none were adopted by the House. Finally, on the twenty-seventh of February, Corwin moved as a substitute for the amendment which the Committee of Thirty-three had advised:

Article XIII—"No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State."<sup>1</sup>

Doubtless the substitute was Corwin's own, for it agreed with his political opinions and was, in constitutional form, the plank in the Chicago platform, which he had quoted in the preface to his report on the 14th of January. Immediately a parliamentary struggle ensued. John Hick-

<sup>1</sup> Journal, H. R., 1860-61, p. 416.

man, of Pennsylvania, a leading abolitionist, moved that the resolution be laid on the table, but the House decided against him, one hundred and twenty-two to sixty-seven. By a vote of one hundred and twenty to sixty-one it then agreed to the amendment. Being engrossed and accordingly read the third time, the vote was taken on its passage; one hundred and twenty responded yea, seventy-one nay, two-thirds not voting in the affirmative, so the resolution was defeated. On the following day David Kilgore, of Indiana, having given notice, when the resolution was defeated, that he should move for a reconsideration, the question of reconsideration was carried by one hundred and twenty-eight to sixty-five. The joint resolution being thus before the House again, it was put to a vote and passed by one hundred and thirty-three to sixty-five.<sup>1</sup> This was one more than a two-thirds vote of the members present. It was then ordered that the concurrence of the Senate be requested, and the Clerk, John W. Forney, bore the message and the joint resolution to the other Chamber. It happened that on the day when the resolution passed the House, Elihu B. Washburne, of Illinois, the member on the joint committee appointed to inform Lincoln and Hamlin of their election as President and Vice President, reported them as accepting the trust, "now rendered doubly difficult by existing perils," said Lincoln. But he accepted the Presidency "with a firm reliance on the strength of our free government, and the ultimate loyalty of the people to the just principles upon which it is founded, and, above all, an unshaken faith in the Supreme Ruler of nations." "It shall be my earnest effort," said he, "to discharge my

<sup>1</sup> Id., p. 426. Globe, 1263, 1264, 1284, 1285.

duty in that manner which shall subserve the interests of the whole country.”<sup>1</sup>

But would the Senate pass the Corwin amendment, and would the President-elect, and his party execute it, if it was ratified by the requisite number of States?

The House resolution went to the Senate on the day when Crittenden, of the select committee to whom was referred the resolutions from the peace commissioners, reported an amendment, and Seward, by unanimous consent, brought in a joint resolution calling a national convention. The resolutions of the Peace Conference passed to a second reading. Hunter, of Virginia, and Collamer, of Vermont, offered amendments to the conference propositions, but they were rejected,<sup>2</sup> the vote, nearly two to one, showing that the conference resolutions themselves had little weight with the Senate. At noon, on the second, the Corwin amendment was the order of the day. But before the Peace Conference report was displaced by the House resolution, Lane, of Oregon, in a long speech, made a categorical reply to “the oft-repeated question as to what the South complains of and what she fears.” It was the danger that threatened \$4,000,000,000 in property in slaves and as much more of real and personal property connected with it. It was the right of immigration with any of this property, safely, anywhere in the Union. It was the restitution of this property when stolen or escaped. It was the threatened exclusion of more slave States from the Union. It was the constant danger of insurrection, which fanatical hostility in the North towards slavery was constantly stirring up in

<sup>1</sup> In the Senate Journal (p. 337) these words are attributed to Mr. Lincoln; in the House Journal they are attributed to Mr. Hamlin (p. 425).

<sup>2</sup> Senate Journal, 337; Globe, 1269.



the South. Because of these fears and complaints he asked for the passage of the Peace Conference resolutions.<sup>1</sup>

Though the time for taking up the Corwin amendment had been agreed on, Sunday came, the Senate was still in session, and the amendment had not been reached. The remaining hours of the session were numbered and several Senators urged the suspension of personal hostilities that the main business might be pushed to a conclusion. Douglas called for the House amendment, which was read, when Pugh, of Ohio, quoting De Quincey on the duty of a man to preserve the purity of his mother tongue as next to the duty he owes his family, his country and his God, moved to amend Corwin's expression by striking out "authorize or" and make the resolution read: "No amendment shall be made to the Constitution which will give to Congress the power to abolish, or interfere, within any State with the domestic institutions thereof," but Douglas objected, because the change would send the resolution back to the House and it would then fail for the lack of time. "I prefer bad English expressing a good thing to good English expressing a bad thing," remarked Crittenden. The vote was announced a tie,<sup>2</sup> and the Vice President declared Pugh's amendment agreed to. Douglas quickly informed the Senate of the effect of this decision. The House had adjourned until 10 o'clock Monday morning, and it would be impossible for it to act on the resolution during the two hours that remained of its session. Some Senator should change his vote and save the amendment.

A long debate followed, not on De Quincey and good English, but on the resolution itself. Crittenden earn-

<sup>1</sup> *Globe*, March 2, 1861, p. 1346.

<sup>2</sup> *Globe*, March 2, 1861, pp. 1364-1367.

estly supported it; Gwin, of California, pronounced it delusive. Johnson, of Arkansas, denounced it as "one of the most treacherous offerings ever made to the weakness and timidity of those who are now advocating and will continue to advocate to the last, submission on the part of the South on almost any terms that will keep them connected with the Northern States of the Union;" he believed that the resolution would hasten secession. Baker, of Oregon, declared that it was a mistake from beginning to end to suppose that the mere passage of the resolution would settle the complicated questions at issue between the two sections of the Confederacy; it was "one step towards it." But Baker was a Republican, in thorough accord with Lincoln, and defined the resolution as "a proposition upon our part to make that certain which we have always said could be rendered certain." There was no delusion about the amendment; the Republican party did not purpose to interfere with slavery in the States. Gwin was not satisfied. Let the Senate adopt the Crittenden resolutions; they would quiet the country. Pugh, whose love of good English had stirred up this sixth act, replied to Gwin and Johnson, that the proposed amendment added nothing to the Constitution and was not worth the paper on which it was written, except as a declaration of the good faith of the men who voted for it. Simmons, of Rhode Island, corrected Pugh; the amendment would add to the Constitution another provision which henceforth could not be amended, like the provision for the equality of the States in the Senate. So the vote was reconsidered, and Pugh's verbal amendment was rejected by twenty to seventeen.

Public interest in the proceedings had meanwhile been increasing. Preparations for the inauguration of Lincoln were in progress and the city was rapidly filling with

visitors from all parts of the free States. The House having adjourned, the Senate attracted general attention, and while its members were discussing the measures before it, the galleries were crowded, were frequently noisy, and several times were ordered to be cleared. Yet this public interest was not centered on the House amendment. Most of the crowds at the Capitol sought only to be entertained. The attractions in the Senate were the speeches and action of the Southern Senators and the personalities of debate. The inauguration crowd was arriving and overflowing the Senate galleries; this was all. That strange power which we call "the public" was thinking more of Fort Sumter and the probable policy of the new President, than of the passage of a constitutional amendment during the closing hours of the thirty-sixth Congress.

But if the Senate would not consent to good English in the Corwin amendment, would it not substitute the Crittenden resolutions? This was Pugh's second amendment. In the history of proposed constitutional amendments, thus far, no series of propositions had received so general an approval as these which went under the name of the Kentucky Senator. Congressional committees, State legislatures, party conventions and popular gatherings had repeatedly urged their adoption. Now again, and for the last time, they were offered to the Senate. They were slightly changed from the original, and Douglas's article excluding the African race from the elective franchise and the right to hold office was inserted. But the variation did not offend either Democrats or Republicans, for it was substantially the law of the land. Wilkinson, of Minnesota, opposed to both the Corwin resolution and the substitute now offered, expressed the opinions of the plain people of the free States, that the

Constitution was not in need of amendment. "I am well aware that the influence which surrounds this metropolis, which pervades this Chamber, and which clusters round the Representatives of the people in the other end of this Capitol, is strongly in favor of any surrender, no matter how humiliating, how degrading, how violative of the principles of liberty and justice such surrender may be, provided the moneyed interests of the commercial and trading districts of the country can be upheld."<sup>1</sup> "The people of the Northwest will never consent to the idea of a Southern Confederacy, to take possession of the mouth of the Mississippi river. This act, of itself, will lead to war." Doolittle, of Wisconsin, then offered an additional section, that no State had the power to withdraw from the Union. This was rejected by twenty-eight to eighteen. Douglas again reminded the Senate of the shortness of the time, urged the passage of the Corwin amendment and, then, to take up the propositions of the Peace Conference. Zachariah Chandler, of Michigan, at this point asked Powell, of Kentucky, who, it will be remembered had called for the Committee of Thirteen, at the opening of the session, whether, after the House resolution or any other compromise was adopted, he was prepared to go with the Union-loving men of the Nation, for enforcing the laws of the United States in all the States. "I am for enforcing the laws in all the States that are within the Union," replied Powell, "but I am opposed to making war on States that are without the Union. I am opposed to coercing seceding States." Chandler had said, in a private letter, to which Powell referred, that it was necessary to have a little blood-letting, or the Union would not be worth preserving, and he now quoted Jefferson's well-known let-

<sup>1</sup> *Globe*, March 2, 1861, p. 1369.

ter on Shays' rebellion. "This is not a question of compromise," he continued, "this is a question whether we have a government or not." "What has all this to do with the question before the country?" inquired Wigfall, of Texas. "The Union is dissolved. Seven States have dissolved their connection with the balance. Texas went out to-day. What do you propose doing?"

"It is better then, to look this matter steadily and honestly in the face, and see what is the grievance. The grievance is not about the territories. It is the denial that slaves are property and the declaration that the Federal Government has a right to settle that question. Nothing short, I believe, of an amendment to the Constitution declaring that each State has the right to secede—which is admitting the right of self-government to the people of each one of these sovereign States—will give satisfaction. I am sure, if you are talking about reconstruction, and expecting any one of these Gulf States to come back, that nothing short of that would induce them even to entertain your propositions. You must admit that the masters are free; that they have a right to live under such a government as they see fit; that they can peaceably, quietly, constitutionally change their government if they see fit. When you do that, then they will entertain the proposition as to whether the form of government you offer them is satisfactory or not. But while you deny the right of secession, while you deny the right of self-government, those men will not consider whether they are to be well governed or badly governed, and they should not. Admit the right to govern themselves, and then offer amendments to the Constitution securing the right to their property in this Government, then they will entertain the proposition. Nothing short of that, I am satisfied, would induce any one of the Confederate

States again to secede from the Confederation and come back into this.

"Now, whether what are called the Crittenden resolutions will produce satisfaction in some of these border States or not, I am unaware; but I feel perfectly sure they would not be entertained upon the Gulf. As to the resolutions which the Peace Congress has offered us, we might as well make a clean breast of it. If those resolutions were adopted and ratified by three-fourths of the States of this Union, and no other cause ever existed, I make the assertion that the seven States now out of the Union would go out upon that. The first proposition is to do what? The Wilmot proviso north of  $36^{\circ} 30'$  north latitude, and a lawsuit south of it. The next is to give the Federal Government the right to declare a free negro a citizen. Those two propositions would be enough of itself to dissolve the Union, if nothing else offered." <sup>1</sup>

The Senate now took a recess until seven o'clock, Sunday evening, long before which time the galleries and all available space on the floor of the Chamber were filled with spectators. There was great confusion. The crowd in the halls kept pressing toward the galleries and Crittenden, who had arisen to address the Senate, was prevented, by the noise, from continuing. Douglas accused the Republican members of having invited the crowd for the purpose of obstructing public business. Finally the galleries, to the right of the Vice President, were cleared, the Senate having voted this unusual procedure. Henry Wilson succeeded in getting the vote reconsidered, and Crittenden began his pacific appeal. He appeared, he said, as the advocate of Union, not of slavery. The difficulty was territorial, like that which threatened the country in 1820. A similar remedy was there-

<sup>1</sup> Globe, 1873-1874.

fore needed. Indeed the controversy was narrowed down to one Territory, New Mexico, the most sterile region within the Union, the least happy, already open to slavery ten years, and yet not having thirty slaves. It was not a country that could be made a profitable slave State. Therefore, the pending question was one of mere abstract right, over which North and South were battling. Not that the South was wholly right, but it had some plausible reasons for dissatisfaction with the North. Let New Mexico remain slave soil; it would be a small concession for so great a good. Draw the line of partition between free soil and slave. Let there be a compromise. The Senate had a high mission; the pacification of the country. Hold fast to the Union. Quiet anti-slavery agitation: it was not too great a price to pay for peace. Do it as a common benefit, not as a bargain. Why let the Union be destroyed, when a simple compromise would save it? Though the House resolution did not, in his opinion, cover the case, yet it might have some good effect "like a ray of sunshine breaking through the clouds."

Trumbull, of Illinois, a leading Republican Senator, followed. Secession had long been planned and threatened. The Government must protect its own. Who would talk compromises when the authority of the national Government was defied by seceding States? Every effort at compromise had been repudiated. "I will never agree to put into the Constitution a clause establishing, or making perpetual, slavery anywhere."

"The seven free States of the Northwest, at the late presidential election, cast three hundred thousand more votes than all the fifteen Southern States together." Kentucky, New Jersey and Illinois had called on Congress to summon a constitutional convention. But the

Constitution needed no amendments. And he replied to Wigfall's question, as to what the Government intended to do about it, saying: "I am for executing the laws; I am for coercion. I am for settling, in the first place, the question whether we have a government, before making compromises which leave us as powerless as before." The resolutions of the New York legislature, "tending to the Federal Government all the resources of the State in money and men to maintain the Government, had a most salutary effect; it was the first blow at secession." Baker continued the discussion in the same spirit, but with a less vigorous presentation of national ideas.

Again Douglas warned the Senator of the brevity of time, urged the adoption of the House resolution and then, of the propositions which the Peace Conference had submitted. Bingham, of Michigan, now offered a substitute for the pending amendment, that the Constitution did not need amendment, but the laws should be enforced, and all the energies of the departments, and the efforts of good citizens should be directed to maintain the existing Union and to prevent all attempts at its dissolution. This was rejected by a vote of twenty-four to thirteen.<sup>1</sup> Grimes, of Iowa, moved for Congress to call a Constitutional Convention, but the proposition was rejected by almost the same vote.<sup>2</sup> Johnson, of Arkansas, then proposed that the resolutions of the Peace Conference be submitted for the House resolution, but the vote was more decisive—thirty-four to three.<sup>3</sup> This vote brought the Senate to the joint resolution. It was read a third time; the roll was called; twenty-four votes were recorded in its favor, and twelve against it, and the presiding officer, Tru-  
sten

<sup>1</sup> Journal, 380; Globe, 1387.

<sup>2</sup> Journal, 380; Globe, 1401.

<sup>3</sup> Journal, 382; Globe, 1402.



Polk, of Missouri, announced that it had passed. Trumbull, who with the leading Republican Senators had voted against it, raised the question, whether a joint resolution, proposing an amendment to the Constitution, did not require an affirmative vote of two-thirds of the members composing the Senate. The President replied, that it required an affirmative vote of two-thirds of the Senators present, only, in which opinion he was sustained; Wade, of Ohio, alone dissenting.

Thus, at last, the Thirteenth Amendment of 1861 passed Congress. It was a measure which pleased nobody, wholly, for even as a party proposition it was falling behind the march of events. It failed to present the opinions of Chandler, Trumbull, Doolittle and Wade in the Senate just as it failed to present the opinions of James M. Ashley, Roscoe Conkling, Galusha A. Grow, John Hickman, Owen Lovejoy, Francis E. Spinner, Thaddeus Stevens and Elihu B. Washburne in the House. The Senate had been in continuous session nearly three days, and the resolution, discussed chiefly on Sunday, was passed in the night, or probably in the early hours of March fourth. Buchanan, as is the custom at the end of a session, was in the President's room, busily signing acts and resolutions. This one, among the last passed by the Senate, was duly signed by the Vice-President, and shortly before the time for the inauguration of his successor, reached Buchanan and was signed by him. It may almost be said to have been the last legislative act of his life. Why it was presented to the President for signature does not appear. It seems to have been sent with the mass of documents demanding the President's attention.

Trumbull had refused to vote for the resolution because it made slavery perpetual in the States. This was its essential quality. Had it made slavery perpetual every-

where in the Union, it would have won support from some, but not from all, Senators and Representatives from the South who withdrew from Congress before it passed.

But no one should allow himself to believe that the amendment attracted as much attention outside of Congress as within it. The people were thinking of the new administration and its probable policy towards the South. While the compromise measures were pending, Congress had been flooded with petitions and resolutions from States, cities, counties, conventions and individuals to restore peace to the country, and most of the resolutions urged the adoption of the Crittenden resolutions. The number is scarcely suggested by the list which covers more than six pages of the index to the Journal of the Senate, and a greater number in the index to the Journal of the House.<sup>1</sup> These, hundreds in number, were no more diverse in contents, than the amendments and resolutions offered in Congress and referred to the Committee of Thirteen, in the Senate, and the Committee of Thirty-three in the House. Meanwhile the hour had come for the induction of the new President into office and Mr. Lincoln had taken his place, in accordance with custom, on the great east porch of the Capitol to deliver his inaugural address. A vast assemblage had already gathered and was expectant to hear some declaration, from his lips, of the immediate policy of the national government toward the southern Confederacy. Mr. Lincoln's opinions on the great questions of the hour were well known. He had taken the Nation into his confidence and had repeatedly declared his opinions to a degree of frankness unprecedented among public men. It was expected that he would

<sup>1</sup> One petition from the New York Chamber of Commerce presented by Senator Seward was said to have 38,000 signatures. See Congressional Globe, January 31, 1860, p. 657.

speak of slavery, but it may be doubted whether many of his auditors were looking for any opinion of the amendment which had passed Congress a few hours before, and had been signed by Buchanan while Mr. Lincoln was moving to the place from which to deliver his address. The few who thought of the amendment were not disappointed.

Near the close of his inaugural, Mr. Lincoln referred to the amendment. "I cannot be ignorant of the fact that many worthy and patriotic citizens are desirous of having the National Constitution amended. While I make no recommendation of amendments, I fully recognize the rightful authority of the people over the whole subject, to be exercised in either of the modes prescribed in the instrument itself; and I should, under existing circumstances, favor rather than oppose a fair opportunity being afforded the people to act upon it. I will venture to add that to me the convention mode seems preferable, in that it allows amendments to originate with the people themselves, instead of only permitting them to take or reject propositions originated by others not especially chosen for the purpose, and which might not be precisely such as they would wish to either accept or refuse. I understand a proposed amendment to the Constitution—which amendment, however, I have not seen—has passed Congress, to the effect that the Federal Government shall never interfere with the domestic institutions of the States, including that of persons held to service. To avoid misconstruction of what I have said, I depart from my purpose not to speak of particular amendments so far as to say, that, holding such a provision to now be implied constitutional law, I have no objection to its being made express and irrevocable."<sup>1</sup> In the original draft of his inaugural, Lincoln had written: "As I am not much impressed with the

<sup>1</sup> Lincoln's Works, II, 6.

belief that the present Constitution can be improved, I make no recommendations of amendments. I am rather for the old ship, and the chart of old pilots. If, however, the people desire a new or an altered vessel, the matter is exclusively their own, and they can move in the premises, as well without as with an Executive recommendation. I shall place no obstacle in the way of what may appear to be their wishes." Mr. Seward suggested a change of the first sentence to: "While so great a diversity of opinion exists on the question what amendments, if indeed any, would be effective in restoring peace and safety, it would only tend to aggravate the dispute if I were to attempt to give direction to the public mind in that respect." Mr. Lincoln, doubtless convinced that his original language might misrepresent his feelings and opinions, rewrote this portion of the address, changed the meaning and expressed good will towards the amendment just passed.<sup>1</sup>

The later history of this amendment was brief. On the last day of the year in which it passed, the legislature of Illinois authorized the election of a convention to amend the constitution of 1848. It assembled at Springfield on the seventh of January, 1862. Its loyalty was widely questioned, and many people of the State believed that it was a device to take Illinois out of the Union.<sup>2</sup> This charge its members repelled.<sup>3</sup> By the enabling act, the

<sup>1</sup> Nicolay and Hay's Lincoln, III, 322, 340, note. See also Lincoln's letter to E. B. Washburne counselling no compromises of any sort on "slavery extension," December 13, 1860; and to Lyman Trumbull, enclosing one to General Duff Green, on the amendment, December 28, 1860. Works, I, 658, 661, 662.

<sup>2</sup> See preface to Judge John A. Jameson's treatise on Constitutional Conventions, also the report of the Thornton investigating committee, submitting to the convention, March 19, 1862. Also the Chicago Tribune for February and March, 1862.

<sup>3</sup> Report of Thornton Committee.

convention was to submit its work to a popular vote. Many members, however, claimed that the convention was a sovereign body, with power to promulgate a constitution. This claim was contested and overthrown in the courts.<sup>1</sup> On the eighth of February, its presiding officer, William A. Hacker, moved the ratification of the Corwin amendment, and on the fourteenth, by a vote of thirty-nine to twenty-three, an ordinance of ratification was passed, of which due notice was sent to the Department of State at Washington.<sup>2</sup> On the seventeenth of June, following, the people of Illinois repudiated the work of the convention by a majority of over sixteen thousand votes. This made the ordinance of ratification of no effect.<sup>3</sup>

No other Commonwealth acted on the amendment, and amidst the strife of civil war it was wholly forgotten. The amendment is one of the paradoxes of history. Few Americans are aware that while States were seceding and their Representatives in Congress were proclaiming that no compromise on slavery could longer keep them in "the old Confederacy," a Republican House, a Democratic Senate and President Buchanan, proposed an amendment to the Constitution making slavery perpetual in the United

<sup>1</sup> The people of the State of Illinois, ex rel. The City of Chicago vs. Alexander C. Coventry, Frederick Tuttle and William Wayman. Supreme Court of Illinois, April Term, 1862. The Convention on the 21st of March adopted an ordinance empowering the legal voters of Chicago to decide by ballot, at the municipal election in April following, whether the city should thenceforth elect its own officers.

<sup>2</sup> Journal of the Convention, 358, 450, 451. For the ordinance of ratification, sent to William H. Seward, Secretary of State, see Bulletin of the Bureau of Rolls and Library, of the Department of State, No. 7, pp. 518-519.

<sup>3</sup> For the Constitution, 125,052; against it, 141,103.—From the records, Ms. letter, Hon. James H. Rose, Secretary of State, July 25, 1898.

States.<sup>1</sup> And perhaps fewer are aware that President Lincoln, in his inaugural, declared that he had "no objection

<sup>1</sup> In the Reconstruction Convention of Mississippi, of 1865, the proposed amendment of 1860 was characterized as "an amendment—which would have secured forever, the institution of slavery, until each State, of its own free will, saw fit to abolish it. But our people under the excitement which existed, and in the madness of the hour, disregarded and rejected the proposed amendment." *Proceedings and Debates*, 142.

This case, mentioned in note (4), *The People of the State of Illinois, Ex rel., etc.*, involved the question of the powers of a Constitutional Convention. Mr. Beckwith, of counsel for the Respondents; Coventry, Tuttle and Wayman, Police Commissioners of Chicago, argued,—“that the legislature had power to define the duties of the convention, and the purposes for which the delegates to that body should be elected.” “I am unwilling to believe that the framers of the present constitution (Illinois, 1848), having these ends in view, intended that a convention which should be assembled thereafter for its revision, alteration and amendment, with the same ends in view, should have power to abrogate one provision after another until every vestige of a constitutional government was destroyed, and then usurp the supreme authority of the government itself.” “As before remarked, the people when they voted for and elected delegates to the convention, never intended that it should have any powers, other than what the law conferred upon it. The people never intended to delegate to the convention the supreme authority of the State, with power to repeal and pass laws at its will and pleasure. The people elected the delegates to frame a constitution under the law, and submit it to them for their adoption or rejection, and for no other purpose. The powers of the convention were neither legislative, executive nor judicial, but related to an organic law, prescribing the form of the government, imposing duties upon its several departments and restraining them within certain limits. The office of such a law is to declare in whom the several powers of the government shall be vested, and to impose duties and restraints upon each of its departments. Beyond these provisions the convention had no power to go, and when it transcended these limits its acts were void, even with the adoption of them by the people. If it could pass laws, and put them in force by a vote of the people, it could have tried cases and had its judgments become binding in the same manner. Taking well-established principles as our guide, they lead

to the irresistible conclusion that the late convention was subject to the constitution and the laws, and its powers were limited to the purposes specified in the law calling it into existence." Brief for Respondents, by C. Beckwith, F. Fulton & Co., Printers, 148 Lake street, Chicago, pp. 21-22.

Per contra, B. F. Ayer (Brief printed by the Chicago Times Book and Job Printing Establishment, No. 74 Randolph street, 1862), "The convention has the sole power of determining what shall be the organic law, and whatever it prescribes (subject in some cases to the ratification of the people) becomes a part of the constitution. The courts cannot control or annul its decision." P. 19.

W. C. Goudy (Brief 21-47 pp.): The convention had power to pass the ordinance as to elective officers in Chicago (pp. 26-42); also to legislate (pp. 42-44); and these principles were exhibited in the State of Illinois (under the constitution of 1848), (pp. 44-46).

Melville W. Fuller (Brief, 49-74 pp.): "The convention assembled to make organic laws. It is difficult to see what tribunal has a right to say that any ordinance adopted by them does not thereby become, ipso facto, the supreme law. So far as their power is concerned they could adopt a code and make that the organic law. Where is the limitation? They met to frame a constitution, who shall say what shall or shall not be put into it?" P. 71.

MS. marginal note on this opinion by Judge John A. Jameson: "Fundamental law is this provision, all other that of the legislative. But the frontier is undefined. That may leave some cases in doubt. But take a clear case, we can pronounce the action of the convention to be usurpative, although there is no mode of undoing its work. There may be no sanction and yet it may be guilty of transcending its proper sphere. That there is none, is the misfortune of the people, not the warrant or excuse of the convention."

"It is equally well settled that the convention had power to repeal laws." (Fuller, Brief, p. 72.)

MS. and marginal note by Judge Jameson: "But only by constitutional provision. If it should attempt to do so by ordinance, it would be usurpation. To be sure, the people might ratify, but that would only legitimate the result, not make the action, ab initio, valid and legitimate."

Also, per contra, F. H. Kales. (Brief, 10 pp.) The sovereign power of a convention was decided, adversely, in the Cases of Wells and Others vs. The Election Commissioners (of Philadelphia) (1873), 75 Pa. State Reports, 39. See also "The Power of the Constitutional Convention Containing the Pleadings, Briefs,

to its being made express and irrevocable.”<sup>1</sup> But man and nature were against the principle of the proposed amendment. We shall see how it was ignored by the Nation.

**Arguments of Counsel and Opinion of the Justices of the Supreme Court of Pennsylvania” in these Cases. Philadelphia: King & Baird, Printers, 607 Sansom street, 1873, 206 pp.**

The sovereign power of a constitutional convention was decided, favorably, in *Sproule vs. Fredericks*, 69 Miss. 898. (1892.)

Commenting on the Chicago Cases, Judge Jameson remarks:

“This case was decided by the Supreme Court against the Re-lator on the ground that by (the people's) rejecting the constitution, the whole constitution fell to the ground, including the Chicago ordinance. The court below decided the same way, but upon different ground. The decision in this case is decisive of one point, that—the Constitution and ordinances formed for submission—got no validity at all from the fiat of the Convention.”

<sup>1</sup> For the numerous resolutions submitted to the House, see Journal, 36th Congress, 2d Session, December 3, 1860, et seq. They are also given in the *Globe*.















